SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 129

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF LOUISE P. V. WHITCOMB, DECEASED, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES OF ATTORNEYS.

ALFRED SUTRO, Esq., F. T. SMITH, Esq., V. K. BUTLER, Esq., ROBERT LITTLETON, Esq., For Taxpayer.

JOHN D. FOLEY, Esq., For Commissioner.

DOCKET ENTRIES.

1926

May 19—Petition received and filed.
" 21—Copy of petition served on solicitor.
" 21—Notification of receipt mailed taxpayer.
July 16—Answer filed by solicitor.
Aug. 25—Copy of answer served on taxpayer, general calendar.

1928

June 30—Hearing date set 10-23-28.
Oct. 17—Motion to transfer to reserve cal. filed by taxpayer. See 16117. Granted 10-18-28.

1929

Mar. 11—Hearing set 4-18-29.
Apr. 5—Motion to place on reserve cal. filed by G. C. See 16121. 4-8-29 granted.
" 8—Motion to place on reserve cal. filed by taxpayer. No action necessary.
Nov. 19—Hearing set Jan. 24, 1930.
" 26—Motion to place on cir. cal. for hearing in San Francisco, Cal., filed by taxpayer. See 16117.
" 29—Motion granted.

1930

Mar. 11—Hearing set May 19, 1930, San Francisco, Cal.

Apr. 19—Motion to consolidate with dkts. 16117 to 16122, 27940 to 27944 and 46510 to 46513 and to amend petition, amendment tendered, filed by taxpayer. 4-19-30 granted.

" 24—Copy of amended petition served on G. C.

May 19—Hearing had before Mr. Marquette. Submitted. Motion to consolidate for hearing and decision with dkts. 46510-11-12-27940-41-42-43-44-16117-18-19-20-21-22. Amended answer to be filed by respondent. (Dictated into record) briefs due Sept. 1, 1930.

Aug. 16—Stipulation for extension to 10-1-30 to file briefs filed. 8-22-30 granted.

" 19—Transcript of hearing of May 19, 1930 filed.

Sept. 25—Motion for extension to Oct. 15, 1930 to file brief filed by taxpayer. 9-29-30 granted. See 16117.

" 29—Brief filed by G. C.

Oct. 8—Motion for extension to Nov. 1, 1930 to file brief filed by taxpayer. 10-9-30 granted.

" 31—Request for findings of fact and brief filed by taxpayer. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1931

Feb. 11—Findings of fact and opinion rendered, John J. Marquette, Div. 1. Judgment will be entered under rule 50.

May 20—Notice of settlement filed by G. C.

" 25—Hearing set June 24, 1931, on settlement.

June 13—Consent to settlement filed by taxpayer.

" 25—Decision entered, John J. Marquette, Div. 1.

Dec. 22—Petition for review to U. S. Cir. Ct. of Ap. (9) with assignments of error filed by G. C.

" 22—Proof of service filed.

1932

Feb. 10—Motion for extension to Apr. 20, 1932 for preparation of evidence and delivery of record filed by G. C.

" 12—Order enlarging time to April 20, 1932, for preparation of evidence and delivery of record entered.

Mar. 17—Statement of evidence lodged.

" 19—Notice of lodgment of statement and of hearing Mar. 30, 1932, filed.

" 30—Hearing had before Miss Matthews on approval of statement of evidence. Motion of petitioner to continue granted to April 13, 1932.

" 30—Order of continuance to April 13, 1932 for hearing on approval of statement of evidence entered.

Apr. 12—Statement of evidence approved and ordered filed.

" 14—Praecipe with proof of service thereon filed.

" 18—Order entered extending time for transmission of record to May 20, 1932. [2]

United States Board of Tax Appeals.

Docket No. 16,120

ESTATE OF LOUISE P. V. WHITCOMB,
Deceased,

By

JOHN FREULER, Administrator,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:PA:1-60D-GWF-105) dated March 23, 1926, and as the basis of his proceeding alleges as follows:

1. Louise P. V. Whitcomb was, up to her death in 1921, a non-resident alien individual. John Freuler, Administrator of the decedent's Estate, is an individual residing in San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 23, 1926.

3. The taxes in controversy are income taxes for the calendar year 1921 and for the amount of $723.60. [3]

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

The Commissioner in determining the taxable income of the decedent, up to the date of her death in 1921, added to her distributive share of the net income of the trust estate of A. C. Whitcomb, a portion of the depreciation and losses sustained by and allowable to the said Estate in determining its net income for the taxable year 1921.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A fiduciary return on Form 1041 was filed for the trust estate of A. C. Whitcomb for 1921 by the Trustee. In computing the net income of the said Estate and the distributive income of each beneficiary thereof, there were claimed as deductions $43,003.16 as depreciation on the physical assets of the Estate used in producing the income thereof, and $3,587.50 as losses sustained on the sale of Liberty Bonds, a total deduction of $46,590.66. In computing the distributive share of net income of each of the beneficiaries of the said Estate, including the petitioner, the Commissioner has added back to

such distributive share a proportionate part of the depreciation [4] and losses sustained by the Estate, the total depreciation and losses so added back being $46,590.66, of which $7,765.08 was added back to the distributive share of net income of the petitioner.

6. The propositions of law involved are these: The income to be included in the individual return of the petitioner as income from the trust estate created by A. C. Whitcomb is limited to the petitioner's distributive share of the correctly computed net income of the Estate.

WHEREFORE, the petitioner prays that it be held by the Board that the error above mentioned was made by respondent and that no liability rests upon the petitioner to pay the taxes asserted in the notice of deficiency, and for such other relief as may appear equitable and proper as this cause progresses.

W. W. SPALDING,
Counsel for Petitioner,
Woodward Building,
Washington, D. C. [5]

State of California,
County of San Francisco.—ss.

John Freuler, being duly sworn, says that he is the duly appointed Administrator of the Estate of Louise P. V. Whitcomb, and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the

statements therein contained; and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

JOHN FREULER.

Subscribed and sworn to before me this 11th day of May, 1926.

[Seal] MINNIE V. COLLINS,
Notary Public. [6]

EXHIBIT "A"

Form NP-2

Treasury Department
Washington

IT:PA:1-60D Mar 23, 1926.
GWF-105

Louise P. V. Whitcomb,
c/o James Otis,
201 Sansome St.,
San Francisco, Calif.

Madam:

The determination of your income tax liability for the year 1921, as set forth in office letter dated February 8, 1926, disclosed a deficiency in tax amounting to $723.60.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be

mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assesment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:1, GWF-105-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. Blair,

Commissioner.

Enclosures:
Statement
Waiver - Form A
Form 882.

By /s/ C. R. Nash

Assistant to the Commissioner. [7]

IT:PA:1-60D
GWF-105

Statement

In re: Louise P. V. Whitcomb,
c/o James Otis,
201 Sansome St.,
San Francisco, Calif.

1921

Deficiency in Tax—$723.60

An audit in connection with the fiduciary return of income, Form 1041, filed for the Estate of A. C. Whitcomb, discloses your distributive share of the net income of the estate as corrected to be $10,019.97 instead of $2,254.89 as reported in your return. This amount has been reduced by $273.30, representing non-taxable Liberty Bond interest reported from the estate, leaving taxable distributive income of $9,746.67. The change is due to certain adjustments made in the fiduciary return, which are fully explained in a letter of this date addressed to Mr. James Otis, Trustee under the Will of A. C. Whitcomb, deceased.

Your taxable net income as corrected is $9,746.67 upon which the correct tax liability is $797.97. Since the records disclose a previous assessment of $74.37, there is a deficiency of $723.60.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[Endorsed]: Filed May 19, 1926. [8]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits the allegations contained in paragraph 2 of the petition.

(3) Admits the allegations contained in paragraph 3 of the petition.

(4) Denies that he committed the error alleged in paragraph 4 of the petition.

(5) Admits that a fiduciary return was filed for the trust estate of A. C. Whitcomb, for the year 1921 by the trustee, that deductions on account of depreciation and losses on the sale of Liberty Bonds was claimed on such return in the amounts alleged in paragraph 5 of the petition, and that the Commissioner restored such deductions to income and thereby proportionately increased the distributive shares reported for the beneficiaries. Denies, however, that any loss was sustained on the sale of Liberty Bonds, or that if a loss was sustained, the amount thereof was $3,587.50, and further denies any depreciation was sustained or that if depreciation was sustained, the amount thereof was $43,003.16. Denies that the trustee was empowered or

required by the trust instruments to deduct depreciation for losses on the sale of capital assets in determining the distributive shares of the beneficiaries. [9]

(6) Denies generally and specifically each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
M. N. FISHER,
Special Attorney.

[Endorsed]: Filed July 16, 1926. [10]

United States Board of Tax Appeal.

	Docket
MARGUERITE T. WHITCOMB,	No. 16117
LOUIS A. WHITCOMB,	No. 16118
ESTATE OF LOUISE P. V. WHITCOMB,	No. 16119
ESTATE OF LOUISE P. V. WHITCOMB,	No. 16120
LYDIA L. WHITCOMB,	No. 16121
CHARLOTTE A. W. LEPIC,	No. 16122
LOUISE A. F. E. WHITCOMB,	No. 27940
MARIE M. E. G. T. WHITCOMB,	No. 27941
ESTATE OF LOUISE P. V. WHITCOMB,	No. 27942
LYDIA L. I. WHITCOMB,	No. 27943
CHARLOTTE ANDREE WHITCOMB LEPIC,	No. 27944
LOUISE A. F. E. WHITCOMB,	No. 46513
LYDIA LOUISE IDA WHITCOMB,	No. 46511
MARIE M. E. G. WHITCOMB,	No. 46512
CHARLOTTE ANDREE WHITCOMB LEPIC,	No. 46510
Petitioners,	
vs.	
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	

CONSOLIDATED, AMENDED AND SUPPLEMENTAL PETITION.

The above named petitioners hereby petition for a redetermination of the respective deficiencies set forth by the Commissioner of Internal Revenue in his notices of deficiency designated and dated as follows, to-wit:

(a) IT:PA:1-60D-GWF-105-March 23, 1926 (except the notice of $178.52 deficiency of Freuler, Administrator, which was dated March 24, 1926);

(b) IT:PA:1-60D-LVH-March 8, 1927;

(c) IT:AR:B-2:OVN-60D-November 4, 1929;

and as a basis of their respective proceedings allege as [11] follows:

1. The respective petitioners are as follows:

(a) The petitioner, Louise Adolphine France Emmanuelle Whitcomb, also known as Louis A. Whitcomb (by error referred to in the male gender in the original petition filed in Docket No. 16,118) and also known as Louise A. F. E. Whitcomb, is a non-resident alien individual residing in France and is also a minor. John Freuler, an individual residing in the City of San Francisco, State of California and having his business address at 485 California Street in said City and State, is the duly qualified and acting guardian of the estate of the said petitioner.

(b) The petitioner, Lydia Louise Ida Whitcomb, also known as Lydia L. Whitcomb, and also known as Lydia L. I. Whitcomb, is a non-resident alien individual residing in France, and is also a minor. Said John Freuler is the duly qualified and acting guardian of the estate of said petitioner.

(c) The petitioner, Marguerite Marie Elizabeth Gabrielle Thuret Whitcomb, also known as Marguerite T. Whitcomb, also known as Marie M. E. G. T. Whitcomb, and also known as Marie M. E. G. Whitcomb, is a non-resident alien individual residing in France. Said John Freuler is her agent and she has duly authorized him by written Power-

of-Attorney to represent her in all matters pertaining to her federal income tax liability.

(d) The petitioner, Countess Charlotte Andrée Whitcomb Lepic, also known as Charlotte A. W. Lepic, is a non-resident alien individual residing in France. Said John Freuler is her agent and she has duly authorized him by written Power-of-Attorney to [12] represent her in all matters pertaining to her federal income tax liability.

(e) The petitioner, John Freuler, Administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, is the duly qualified and acting administrator of the estate of said decedent. Said decedent was, up to her death in 1921, a non-resident alien individual residing in France. Said John Freuler is an individual residing in San Francisco, California, as aforesaid.

(f) James Otis, is an individual residing in San Francisco, California, having his business address at 310 California Street in said City and State. Said James Otis is the sole duly qualified and acting trustee under the will of A. C. Whitcomb, deceased, from which all the income derived from sources within the United States by the respective petitioners has been and is now received.

2. The respective notices of deficiency are as follows:

(a) Six notices of deficiency of income tax for the calendar year 1921, each designated by the

symbols IT:PA:1-60D-GWF-105 and each dated March 23, 1926, (except the notice of $178.52 deficiency of Freuler, Administrator, which was dated March 24, 1926). Said respective notices of deficiency were mailed on or about said date to the respective petitioners, Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb, Charlotte A. W. Lepic, Louise P. V. Whitcomb (petitioner Freuler's decedent) [13] and John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased. Copies of said notices are attached hereto, made a part hereof, and marked Exhibit "A," Exhibit "B," Exhibit "C," Exhibit "D," Exhibit "E" and Exhibit "F" respectively.

(b) Five notices of deficiency of income tax for the calendar years 1922 to 1925 inclusive each designated by the symbols IT:PA:1-60D-LVH, and each dated March 8, 1927. Said respective notices of deficiency were mailed on said date to the respective petitioners Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb, Charlotte A. W. Lepic and John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased. Copies of said notices are attached hereto, made a part hereof, and marked Exhibit "G," Exhibit "H," Exhibit "I," Exhibit "J" and Exhibit "K" respectively.

(c) Four notices of deficiency of income tax for the calendar year 1926, each designated by the

symbols IT:AR:B-2:OVN-60D, and each dated November 4, 1929. Said respective notices of deficiency were mailed on said date to the respective petitioners, Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb and Charlotte A. W. Lepic. Copies of said notices are attached here- [14] to, made a part hereof, and marked Exhibit "L," Exhibit "M," Exhibit "N" and Exhibit "O" respectively.

3. The taxes in controversy are income taxes of the respective petitioners for the respective taxable years and in the respective amounts as follows:

Each of the following taxpayers, namely,

(a) Louise A. F. E. Whitcomb,

(b) Lydia L. J. Whitcomb, and

(c) Marguerite Marie E. G. T. Whitcomb,

has the following amounts of taxes in controversy:

Proposed Deficiencies.

Year	Amount
1921	$487.58
1922	505.57
1923	401.95
1924	373.43
1925	303.83
1926	494.25
Total	$2,566.61

[15]

(d) Charlotte A. W. Lepic has the following amounts in controversy:

Proposed Deficiencies.

Year	Amount
1921	$ 2,300.44
1922	2,753.14
1923	2,399.50
1924	2,757.60
1925	2,006.36
1926	3,278.99
Total	$15,496.03

(e) John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased, has the following amounts in controversy:

Proposed Deficiencies.

Year	Amount
1921 (prior to the death of petitioner's decedent)	$ 675.77
1921 (subsequent to death of petitioner's decedent)	162.58
1922	364.19
1923	281.92
1924	262.57
1925	251.27
Total	$1,998.30

The determination of tax set forth in each of said notices of deficiency is based upon the following errors: [16]

(a) Respondent erred in adding back to the net distributive income of each of the respective petitioners for the respective taxable years herein involved a portion of the depreciation sustained during said respective years by the trust estate created by the will of A. C. Whitcomb, deceased, which bore the same proportion to the total amount of depreciation so sustained that the income to which such petitioner was entitled under said trust bore to the total amount of distributive income therefrom.

Said total depreciation of said trust estate erroneously included by the respondent as aforesaid, as a part of the taxable net income of the petitioners is as follows:

Year	1921	1922	1923
Depreciation	$43,003.16	$39,408.00	$39,408.00

Year	1924	1925	1926
Depreciation	$39,258.00	$39,108.00	$55,833.00

Said amounts so added back to the net income of the respective petitioners are, by years, as follows: [17]

Year	1921	1922	1923
L. A. F. E. Whitcomb	$5,574.48	$5,638.22	$5,838.22
L. L. I. Whitcomb	5,574.48	5,838.22	5,838.21
M.M.E.G. Whitcomb	5,574.49	5,838.22	5,838.21
C. A. W. Lepic	16,723.45	17,514.67	17,514.68
Estate of L. P. V. Whitcomb	(7,167.19 (2,389.07	4,378.67	4,378.68
Total depreciation	$43,003.16	$39,408.00	$39,408.00

Year	1924	1925	1926
L. A. F. E. Whitcomb	$5,816.00	$5,793.77	$9,305.50
L. L. I. Whitcomb	5,816.00	5,793.78	9,305.50
M. M. E. G. Whitcomb	5,816.00	5,793.78	9,305.50
C. A. W. Lepic	17,447.99	17,381.35	27,916.50
Estate of L. P. V. Whitcomb	4,362.01	4,345.33	
Total depreciation	$39,258.00	$39,108.01	$55,833.00

5. The facts upon which the respective petitioners rely as the basis of their respective proceedings are as follows:

(a) Petitioners, and each of them, are the life beneficiaries of the estate of A. C. Whitcomb, deceased.

A. C. Whitcomb died in the year 1899, or thereabouts, leaving a last will and testament, copy of which is attached hereto and marked Exhibit "P."

The last will and testament of A. C. Whitcomb, deceased, [18] was duly proved and probated in the Superior Court of the State of California, in and for the City and County of San Francisco.

The Executors named in the will of A. C. Whitcomb were Jerome Lincoln and Adolphus Darwin Tuttle, who were directed to carry out the provisions of said will and administer the Estate of A. C. Whitcomb as therein provided.

The income from the trust estate was paid in equal shares to Louise P. V. Whitcomb, Adolph Whitcomb and Charlotte A. W. Lepic until the death of Adolph Whitcomb, which occurred September 5, 1914. Thereafter and until the death of said Louise P. V. Whitcomb on June 14, 1921, the one-third share of the said Adolph Whitcomb in the income was paid in three equal parts to his widow, Marguerite Marie E. G. T. Whitcomb, and his two children, Lydia L. I. Whitcomb and Louise A. F. E. Whitcomb, petitioners herein; the remaining two-thirds of the income from the trust estate was paid in equal shares to Louise P. V. Whitcomb and Charlotte A. W. Lepic. From June 14, 1921, until on or about August 28, 1925, four-ninths of the total net income of said trust [19] estate was paid to said widow and said two children of Adolph Whitcomb, petitioners herein, an additional four-ninths thereof to Charlotte A. W. Lepic, petitioner herein, and the remaining one-ninth thereof to John Freuler, Administrator of the Estate of Louise P.

V. Whitcomb, deceased, petitioner herein. At all times herein mentioned since August 28, 1925, one-half of the income has been paid to said widow and two children of Adolph Whitcomb, petitioners herein, and the remaining one-half thereof to Charlotte A. W. Lepic, petitioner herein. Upon the death of Charlotte A. W. Lepic said trust will terminate and the remainder interests in the assets of said trust estate will vest in possession and enjoyment.

(b) The original Trustee of said Estate, provided for under Seventh Paragraph of the will of A. C. Whitcomb, was Jerome Lincoln, who had power to appoint his successors in trust. On or about the 3rd day of September, 1891, said Jerome Lincoln, acting under said power of appointment, by an instrument in writing, duly executed, given, and made, appointed Winfield S. Jones, Jerome B. Lincoln and James Otis to be his successors under said trust. [20]

On or about the 23rd day of February, 1896, the said Jerome Lincoln died, and said Winfield S. Jones, Jerome B. Lincoln and James Otis became Trustees of said trust. Thereafter the said Winfield S. Jones and Jerome B. Lincoln died, and James Otis became the sole surviving Trustee of said trust. At all times since the year 1905 said James Otis has been and now is the sole Trustee of said trust.

(c) On or about the 11th day of April, 1890, by decree of final distribution in the matter of

the Estate of said A. C. Whitcomb, deceased, the Superior Court of the City and County of San Francisco, State of California, duly ordered and decreed that certain property be distributed in trust. An itemized list of said property so distributed is attached hereto, made a part hereof and marked Exhibit "Q."

Said property consisted almost entirely of assets of a character nondepreciable by wear, tear and exhaustion. On or about February 23, 1906, James Otis, as trustee of said trust estate, owned and held promissory notes, mortgages, bonds, corporate stocks and savings deposits in the aggregate value of $3,082,907.42 together with the lots mentioned in Exhibit "Q" and other unimproved lots valued at approximately $19,000.00. During the years 1906 to 1924 inclusive said trustee purchased and constructed hotels, buildings, improvements and hotel furniture and fixtures at a total cost of over $2,000,000.00, thus changing a large part of the corpus [21] of said trust estate from property and assets of a nondepreciable character by wear, tear and exhaustion to property of a highly depreciable character by wear, tear and exhaustion. On November 12, 1928, James Otis, as said trustee, held only one unimproved lot, only $113,915.00 in bonds and stocks and only $66,000 in promissory notes.

(d) During the years 1921 to 1926, inclusive, depreciation was sustained and allowed as a deduc-

tion to said Trust Estate, by the Bureau of Internal Revenue, in the following amounts:

1921	$43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00

Prior to the time that the Trustee of said Trust Estate converted the assets thereof from non-depreciable to depreciable property, it was the practice to distribute to the life beneficiaries thereof the entire net income therefrom. After said conversion, the surviving Trustee, James Otis, continued, on the advice of his attorney, to distribute the net income of said Estate to the life beneficiaries thereof without settling up a reserve to take care of depreciation sustained on depreciable assets. [22]

(e) On or about the 5th day of September, 1928, the trustee of said estate filed in the Superior Court of the State of California, in and for the City and County of San Francisco, having jurisdiction of said estate, a petition for the settlement of his account of his trusteeship for the period from February 23, 1903 to February 23, 1918. On the hearing of said petition, Napoleon Charles Louis Lepic and Charlotte de Rochechouart, both of whom are remaindermen and not life-beneficiaries, objected to the approval of said account and protested

against the said practice of said trustee in making distributions to the life beneficiaries of said estate without setting aside a reserve for said depreciation and for certain losses. On or about the 19th day of September, 1928, the said Superior Court allowed said objections in part and ordered that said trustee withhold annually, as a reserve for depreciation of the assets of said estate, such an amount as might be reasonable and proper and ordered that the respective petitioners repay to the said trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections, as the respective amount which should have been retained by said trustee as a reserve for depreciation for each of said years. A copy of said order is attached hereto, made a part hereof and marked Exhibit "R."

By said order the respective petitioners were legally [23] bound to repay to said trustee their respective distributive shares of the following respective amounts on account of depreciation sustained by the trust assets during the respective taxable years herein involved:

Year	1921	1922	1923
Amount	$43,003.16	$39,408.00	$39,408.00
Year	1924	1925	1926
Amount	$39,258.00	$39,108.00	$55,833.00

(f) Thereafter the respective petitioners repaid to said estate the total respective proportionate

amounts required of them with respect to the depreciation for the years 1913 to 1927, both inclusive, in the total amount of $622,434.11.

The respective amounts which each of the petitioners paid back to said estate on account of said depreciation for the taxable years herein involved are the respective proportional amounts of the depreciation of the assets of said trust estate erroneously added back by respondent, as aforesaid, to each of the petitioners' taxable net income for the taxable years herein involved. Since the petitioners received and were paid said amounts illegally under mistake of law and fact, and have returned the same to said trust estate, and were never legally entitled to receive any part thereof, and are not now [24] in receipt of the same or any part thereof, said amounts do not constitute taxable income of the respective petitioners. Respondent has refused and declined to compute the tax liability of petitioners in accordance with the aforesaid facts, which materially affect the determination of income derived from the trust estate; but has erroneously and wrongfully held that his former determination in reference to the tax liability should be adhered to and affirmed.

WHEREFORE, petitioners, and each of them, pray that this Board may hear their consolidated proceedings and that it be held by this Board that the errors above mentioned were made by respond-

ent and for such other relief as may appear equitable and proper as the cause progresses.

FELIX T. SMITH,
Counsel for Petitioners,
Standard Oil Bldg., San Francisco, Cal.

ROBERT A. LITTLETON,
Counsel for the Petitioners,
Tower Building, Washington, D. C.

LOUISE ADOLPHINE FRANCE EMMANUELLE WHITCOMB,
By JOHN FREULER,
Guardian of the Estate of Louise Adolphine France Emmanuelle Whitcomb, a non-resident minor. [25]

LYDIA LOUISE IDA WHITCOMB,
By JOHN FREULER,
Guardian of the Estate of Lydia Louise Ida Whitcomb, a non-resident minor.

MARGUERITE MARIE ELIZABETH GABRIELLE THURET WHITCOMB,
By JOHN FREULER,
Attorney in Fact.

CHARLOTTE ANDREE WHITCOMB LEPIC,
By JOHN FREULER,
Attorney in Fact.

JOHN FREULER,
Administrator of the will of Louise Palmyre Vion Whitcomb, deceased.

JAMES OTIS,
Trustee under the will of A. C. Whitcomb, deceased. [26]

State of California,
City and County of San Francisco.—ss.

John Freuler, being duly sworn, deposes and says: That he is the duly qualified and acting guardian of the Estate of Louise Adolphine France Emmanuelle Whitcomb, a non-resident minor and one of the above named petitioners; that he is the duly qualified and acting guardian of the Estate of Lydia Louise Ida Whitcomb, a non-resident minor and one of the above named petitioners; that he is the attorney in fact of Marguerite Marie Elisabeth Gabrielle Thuret Whitcomb, one of the above named petitioners, and is duly authorized by her, by her written power of attorney, to act for her in all matters pertaining to her federal income tax liability; that he is the attorney in fact of Charlotte Andree Whitcomb Lepic, one of the above named petitioners, and is duly authorized by her by written power of attorney to act for her in all matters pertaining to her federal income tax liability; that he is the duly qualified and acting Administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, one of the above named petitioners; that that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JOHN FREULER.

Subscribed and sworn to before me this 10th day of April, 1930.

[Seal] FRANK G. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [27]

State of California,
City and County of San Francisco.—ss.

James Otis, being duly sworn, says that he is the Trustee of the Estate of A. C. Whitcomb and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JAMES OTIS.

Subscribed and sworn to before me this 10th day of April, 1930.

(Notarial Seal) FRANK G. OWEN,
Notary Public, in and for the City and County of San Francisco, State of California.

For deficiency letter, see original petition filed in this issue.

For Exhibits "P," "Q," and "R," see statement of evidence;

Appendix No. 1, Exhibit "A," Appendix No. 1, portion of Exhibit "B," "Real Property," and Appendix No. 7, respectively.

[Endorsed]: Filed April 19, 1930. [28]

[Title of Court and Cause.]

ANSWER TO CONSOLIDATED, AMENDED AND SUPPLEMENTAL PETITION.

Now comes the Commissioner of Internal Revenue, respondent herein, by C. M. Charest, General Counsel, Bureau of Internal Revenue, his attorney, and for answer to the consolidated, amended and supplemental petition heretofore filed admits and denies as follows:

1 (a), (b), (c), (d), (e) and (f). Admits the allegations of paragraphs 1 (a), (b), (c), (d), (e) and (f).

2 (a), (b) and (c). Admits the allegations of paragraphs 2 (a), (b) and (c).

3 (a), (b), (c), (d) and (e). Admits the allegations of paragraphs 3 (a), (b), (c), (d) and (e.)

Denies that he has committed error in his determination of the deficiencies herein involved. [29]

5 (a). Admits the allegations of paragraph 5(a).

5 (b). Admits the allegations of paragraph 5 (b).

5 (c). Answering the allegations of paragraph 5 (c) he admits that on or about April 11, 1890, by decree of final distribution in the matter of the Estate of A. C. Whitcomb, deceased, the Superior Court of the City and County of San Francisco, State of California, duly ordered and decreed that certain property be distributed in trust. Admits that an itemized list of said property so distibuted is attached to the petition as Exhibit Q. Admits

that on or about February 23, 1906, James Otis, as trustee of said trust estate, owned and held promissory notes, mortgages, bonds, corporate stocks and savings deposits in the aggregate value of $3,082,-907.42 together with the lots mentioned in Exhibit Q and other unimproved lots valued at approximately $19,000.00. Admits that during the years 1906 to 1924, inclusive, said trustee purchased and constructed hotels, buildings, improvements and hotel furniture and fixtures at a total cost of over $2,000,000.00. Denies the remaining allegations of paragraph 5 (c).

5 (d). Answering the allegations of paragraph 5 (d) he admits that during the years 1921 to 1926, inclusive, depreciation was sustained and allowed as a deduction to said trust estate by the Bureau of Internal Revenue in the following amounts:

1921	$43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00

Admits that in determining the amount of income of the trust which was distributable, the trustee did not take into account depreciation sustained [30] by the property of the trust estate. Denies the remaining allegations of paragraph 5 (d).

5 (e). Answering the allegations of paragraph 5 (e) he admits that on or about the 5th day of

September, 1928, the trustee of said estate filed in the Superior Court of the State of California, in and for the City and County of San Francisco, having jurisdiction of said estate, a petition for the settlement of his account of his trusteeship for the period from February 23, 1903 to February 23, 1928. Admits that on the hearing of said petition, Napoleon Charles Louis Lepic and Charlotte de Rochechouart, both of whom are remaindermen and not life-beneficiaries, objected to the approval of said account. Denies the remaining allegations of paragraph 5 (e).

5 (f). Denies the allegations of paragraph 5 (f).

Denies generally and specifically each and every allegation of said consolidated, amended and supplemental petition not hereinbefore expressly admitted, qualified or denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
By J. D. F.
Of Counsel.
JOHN D. FOLEY,
Special Attorney, Bureau of Internal Revenue.

Filed at Hearing May 19, 1930. [31]

A true copy: Teste B. D. Gamble, Clerk U. S. Board of Tax Appeals.

22 B. T. A. .....

United States Board of Tax Appeals.

MARGUERITE T. WHITCOMB, (MARIE M. E. G. and MARIE M. E. G. T. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

LOUISE A. WHITCOMB, (LOUISE A. F. E. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

LYDIA L. WHITCOMB, (LYDIA L. I. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

ESTATE OF LOUISE P. V. WHITCOMB, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

CHARLOTTE A. W. LEPIC, (CHARLOTTE ANDREE WHITCOMB LEPIC), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket Nos. 16117, 16118, 16119, 16120, 16121, 16122, 27940, 27941, 27942, 27943, 27944, 46510, 46511, 46512 and 46513.

Promulgated February 11, 1931.

The petitioners are beneficiaries of a certain trust and entitled to the income thereof. The

trustee, in computing the net income of the trust for 1921 to 1926, inclusive, deducted certain amounts for exhaustion, wear and tear of the trust property, but distributed among the petitioners the amounts deducted for exhaustion, wear and tear, together with the net income so computed. Subsequently a court of competent jurisdiction in a proper suit brought by the remaindermen decided that the trustee should have retained the amounts for exhaustion, wear and tear of the trust property and ordered the petitioners to repay said amounts to the trustee. Held, that the amounts deducted for exhaustion, wear and tear of the trust property in the years 1921 to 1926, inclusive, were not income to the petitioners.

VINCENT K. BUTLER, JR., ESQ., ALFRED SUTRO, ESQ., and FELIX T. SMITH, ESQ., for the petitioners.

JOHN D. FOLEY, ESQ., for the respondent. [32]

These proceedings, which were duly consolidated for hearing and decision, are for the redetermination of deficiencies in income tax which the respondent has asserted as follows:

	1921	1922	1923	1924	1925	1926
Marguerite T. Whitcomb	$524.78	$562.61	$401.95	$373.43	$303.83	$494.25
Louise A. Whitcomb	524.78	562.61	401.95	373.43	303.83	494.25
Lydia L. Whitcomb	524.78	562.61	401.95	373.43	303.83	494.25
Est. of Louise P. V. Whitcomb	902.12	406.96	281.92	262.57	251.27	.....
Charlotte A. W. Lepic	2,416.21	2,909.40	2,399.50	2,757.60	2,006.36	3,278.99

The petitioners allege that the respondent erred in adding to their respective incomes as returned by them for the years mentioned, the depreciation sustained during those years by a certain trust estate of which they were beneficiaries.

FINDINGS OF FACT.

Louise P. V. Whitcomb was from some time in 1889 until her death on June 14, 1921, the widow of A. C. Whitcomb, deceased. The petitioner Charlotte A. W. Lepic is the daughter of the said A. C. Whitcomb, deceased. The petitioners Marguerite T. Whitcomb, Louise A. Whitcomb, and Lydia L. Whitcomb, are the widow and two children of Adolph Whitcomb, deceased, who was the son of A. C. Whitcomb, deceased. [33]

The said A. C. Whitcomb died in the year 1889, a resident of the State of California, leaving a last will and testament which was duly admitted to probate and record by the Superior Court of the State of California, in and for the City and County of San Francisco. Said last will and testament provided, among other things, as follows:

> 7th. I give to my hereinafter named Executor, Jerome Lincoln of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in Trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb one-third part

of the interest thereon or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her; one Adolph, born on or about the 23rd day of February, 1880, and the other Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants "per stirpes" of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in Section Six (6) of this Will, having reference to said Harvard College.

The said will contained no directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciation provided for.

James Otis was appointed a trustee of said trust on February 23, 1896. He has acted as such trustee continuously since that date, and since the year 1905 he has been the sole trustee of said trust. [34]

The original trust estate consisted largely of cash, bonds, stocks and notes. On February 23, 1906, the trust estate consisted of bonds, corporate stocks, cash and promissory notes secured by mortgages, of a total value of more than $3,000,000, and certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco

earthquake and fire occurred. All of the improvements on the San Francisco real estate owned by the trust were destroyed by the fire, including those on the large parcel at Eighth and Market Streets which the trust still owns, and on which the Hotel Whitcomb now stands. Some time after the San Francisco fire the trustee of the said trust adopted the policy of improving the real estate owned by the trust, and of converting the other assets of the estate to accomplish that purpose. As a result of said policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during the years 1921 to 1926, inclusive, consisted almost entirely of improved real estate, including the Whitcomb Hotel and its furniture and equipment. The last item represented an investment of more than $2,000,000.

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear and tear, as follows:

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee or trustees of said trust made payments of the income from the trust in equal shares to the widow and two children of A. C. Whitcomb, [35] until the death of his son Adolph, which occurred on September 5, 1914. The testator's widow, Louise P. V. Whitcomb, died on June 14, 1921. During the years 1921 to 1926, inclusive, the income from said estate was paid as follows:

1921 1/3 to Louise P. V. Whitcomb until her death on June 14, 1921, and thereafter 1/9 to her estate;

1/3 to Charlotte A. W. Lepic until June 14, 1921, and thereafter 4/9;

1/3 to the widow and two children of Adolph Whitcomb, namely Marguerite T. Whitcomb, Lydia L. Whitcomb and Louise A. F. E. Whitcomb, until June 14, 1921, and thereafter 4/9;

1922) 1/9 to the estate of testator's widow,
) Louise P. V.Whitcomb;
1923)
)

1924) 4/9 to the testator's daughter, Charlotte W. Lepic;

and) 4/9 to the widow and two children of the
1925) testator's son, namely, Marguerite T. Whitcomb, Lydia L. Whitcomb and Louise A. F. E. Whitcomb.

1926 1/2 to testator's daughter, Charlotte A. W. Lepic;

1/2 to the widow and two children of the testator's son, namely, Marguerite T. Whitcomb, Lydia L. Whitcomb, and Louise A. F. E. Whitcomb.

The trustee of said trust filed fiduciary returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year, the respective amounts above set forth, repre-

senting exhaustion, wear and tear sustained by the trust. The trustee, however, did not withhold from the beneficiaries to whom income payments were being made, the amounts represented in the depreciation deduction, and each of said beneficiaries received her ratable share thereof during the years involved herein, as well as in preceding years. [36]

From 1903 to 1928, inclusive the trustee, or trustees of said trust presented an annual account to the beneficiaries entitled to income payments, but did not file any account in the Superior Court of California, which has jurisdiction over the trust until its termination for the settlement of accounts and for other purposes.

On September 5, 1928, James Otis, as trustee of said trust, filed with the Superior Court in San Francisco, his account accompanied by a petition for its allowance. The account covered the period from February 23, 1903, to February 23, 1928, and it set out all of the payments made to the beneficiaries of said trust during that period.

The allowance and approval of said account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rochechouart, children of Charlotte A. W. Lepic, one of the beneficiaries herein, who are two of the remaindermen entitled to part of the corpus of the trust upon the termination thereof, if they be then living. In their objections, which were duly filed with the Superior Court of the State of California, in and for the City and County

of San Francisco, they allege that the trust property had sustained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that said amount of $622,434.11 had been paid by the trustee to the beneficiaries of the trust entitled to the income therefrom, as income, thus impairing the trust property by that amount, and they prayed that the trustee be charged with that amount. All of the parties interested in said trust estate, including Harvard College, were notified of the filing of said account of said trustee, [37] and of said objections, and were represented by counsel at the hearing held thereon. On September 19, 1928, the Superior Court of the State of California, in and for the City and County of San Francisco, entered a decree in said matter, which is in part as follows:

> It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objections, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to-wit:

Year.	Amount.
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said Trust it was the duty of said Trustee to make such disbursements without such deduction; that said Trustee [38] in making said disbursements without such deduction was entitled to rely upon said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said

Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or does attach to said Trustee or to said James Otis by reason of having made such disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED and DECREED that the recipients of the income of said trust estate during the period from February 23, 1913, to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive.

It is further ORDERED, ADJUDGED and DECREED that from and after the year ending February 23, 1927, and until the termination of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper.

On January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb, Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart, executed and delivered to the said James Otis as trustee of said trust, their promissory notes for the amounts by which the distributions made to them exceeded the distribution which would have been made [39] had the trustee retained a reserve for depreciation of the trust property. Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart executed a joint note. The other notes were separate notes of the individuals concerned. These notes bear no interest and by their terms are payable at the termination of the trust, which will be upon the death of Charlotte A. W. Lepic. A payment of $10,700 has been made to the trust by the Estate of Louise P. V. Whitcomb.

The several petitioners in their returns of income for the years mentioned, did not include the amounts paid to them in those years by the trustee representing their proportionate share of the depreciation sustained and deducted on the fiduciary return of the estate. The respondent increased the income shown on the several returns by said proportionate share of said depreciation, and determined deficiencies in tax as hereinabove set forth.

OPINION.

MARQUETTE.—The sole question presented by the record herein is whether, under the circum-

stances set forth in the findings of fact, the petitioners in computing their respective incomes for the years 1921 to 1926, inclusive, should include therein that part of the amounts distributed to them by the trustee of the trust created by the last will and testament of A. C. Whitcomb, representing amounts deducted by the trustee in his fiduciary return on account of depreciation of [40] the trust property.

The pertinent statutory provisions are sections 219 (d) of the Revenue Act of 1921; 219 (b) (2) of the Revenue Act of 1924, and 219 (b) (2) of the Revenue Act of 1926.

1921 Act—Section 219 (d):

> * * * there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary.

1924 and 1926 Act—Section 219 (b) (2):

> There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the

> estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.

The intent of Congress in enacting the sections of law quoted was to tax each year to the beneficiary of any trust the share of the trust income which was distributable to him in that year, and to tax to the trustee in his fiduciary capacity any income which was not to be distributed. Anna M. Chambers, et al., 17 B. T. A. 820. We must therefore look to the will of A. C. Whitcomb to determine [41] what part of the income of the trust under consideration was distributable to the petitioners.

The trust which produced the income in question was created by the last will and testament of A. C. Whitcomb, and it and its trustee or trustees are within the jurisdiction of the Superior Court of the State of California, in and for the City and County of San Francisco, and the decree of that Court respecting the trust, when not reversed or modified by a tribunal having appropriate appellate jurisdiction, is binding upon all the parties interested in the trust. Its decrees with respect to the trust are also binding on the several Federal Courts.

Uterhart v. United States, 240 U. S. 598. That Court has determined and decreed that the trustee should have, prior to 1927, deducted from the gross income of the trust and retained in his possession amounts adequate to offset the depreciation of the trust property, and the trustee has been directed to deduct and retain amounts for depreciation in 1928 and thereafter. While the proceeding before the Superior Court may have been a friendly one, as is urged by counsel for the respondent, nevertheless all parties interested in the trust, including Harvard College, the contingent remainderman, were notified and appeared in person or by counsel, and the decree is binding on all of them and fixes the amount of income distributable to each beneficiary. Farewell v. Commissioner, 38 Fed. (2d), 791-795. And the judgment of the Court is that during the years 1921 to 1926, inclusive, the petitioners were entitled only to the income of the trust after deducting and setting [42] aside adequate amounts for depreciation of the trust property, and that they should repay to the trustee what they had received in excess of the proportionate share of the income so computed. In other words, no part of the payments made to them out of the amount deducted for depreciation belonged to them.

In the case of E. L. E. Brenneman, et al., 10 B. T. A. 544, we said in discussing a situation similar to the one here presented:

> We must, therefore, look to the will of L. A. Brenneman to discover what was the distribu-

table share of income of each of the petitioners. See Estate of Virginia I. Stern, supra. Paragraph (a) of the third clause of the will directs the trustees to "invest and from time to time re-invest the said trust estate * * *." And, in the same paragraph, it is provided that "the said trustees shall collect and receive the income or interest from said trust estate and pay out and disburse the same as hereinafter provided * * *." Paragraph (b) of the third clause directs the trustees "to set aside exclusively for the use of my wife, one-third of said trust estate * * * and to pay her annually during her natural life the net income or interest therefrom * * *." Paragraph (g) of the third clause directs that "when my son and daughter arrive at the age of twenty-one years the trustees shall annually thereafter pay to each of them his or her share of the income and interests on the trust estate, the payment to each to be proportionate to his or her share in said trust estate itself.

Prior to the years in question the trustees, with the acquiescence of the beneficiaries, interpreted the directions of the decedent to mean that only "net income" of the trust estate, as that term is used in the taxing statutes, should be distributed to the beneficiaries. Accordingly, they set up reserves to conserve the corpus of the trust. In 1917 and 1918, as well as the years in question, the trustees took deductions

for depreciation and depletion [43] of the oil-producing property and distributed to the beneficiaries only the net income so determined.

It is strenuously urged by the petitioners that the interpretation thus placed on the will cannot be collaterally attacked. It is undoubtedly true that as between the parties in interest an interpretation of long standing placed on the instrument by them will not be disturbed and the courts of Pennsylvania have so held. Appeal of Follmer, 37 Pa. 121; Hagerty v. Albright, 52 Pa. 274. We are not inclined therefore lightly to cast aside or disregard the interpretation placed upon the trust instrument by the parties thereto and adopt a contrary view as a basis for the taxes in question. See Grace Scripps Clark, 1 B. T. A. 491. We think that the decedent's will is susceptible of the interpretation placed thereon by the parties in interest and, consequently, we hold that the deductions for depreciation and depletion, the amounts of which are not in dispute, were properly taken by the trustees and do not constitute income to the beneficiaries. The respondent's action in restoring the amounts so taken as deductions by the trustees to taxable income of the respective beneficiaries is, therefore, reversed.

See also, Kate M. Simon, 10 B. T. A. 1186, John L. Whitehurst, 12 B. T. A. 1416; and Anna M. Chambers, et al., supra.

In the present proceeding the facts are much more favorable to the contention of the petitioners than were the facts in the Brenneman case, because in that case amounts for depreciation and depletion of the trust property were deducted and retained by the trustee pursuant to a construction placed upon the will by the beneficiaries, while in the instant proceeding the will was construed by the Courts and a decree entered announcing such construction and fixing the rights of the parties thereunder. [44]

It is also urged by counsel for the respondent that the beneficiaries have not repaid to the trustee the amounts which according to the decree of the Court were overpaid to them, but have given notes payable at the termination of the trust. This, however, does not in our opinion change the situation. The amounts in question did not belong to the petitioners, and in our theory of the law cannot be income to them. Whether the petitioners ever repay such amounts to the trustee is a matter between them and the trustee and the other parties interested in the trust.

It is our opinion that under the terms of the last will and testament of A. C. Whitcomb, the amount distributable annually to the petitioners herein during the years 1921 to 1926, inclusive, was the income of the trust computed by deducting from gross income amounts for depreciation of the trust property, and that the respondent erred in taxing to the

petitioners more than their proportionate share of the net income of the trust so computed.

Reviewed by the Board.

Judgment will be entered under Rule 50. [45]

MURDOCK (dissenting).—The decedent died in 1889 and the trust in question, so far as we know, began to function shortly thereafter. The account which was objected to covered only the period from February 23, 1903, to February 23, 1928. Prior accounts must have been approved in which there was no deduction for depreciation. Wear, tear and exhaustion of property, sometimes called depreciation, does not depend upon revenue acts. Yet, we see that the objection of those opposing the account related to depreciation which had been sustained from 1913 to 1927 only. 1913 was the first year that there was an income-tax act which might affect these petitioners. We must assume that during all of the years that the trust existed, up to the year 1928, the income from the trust property, undiminished by any amount representing depreciation, had been paid regularly to those having life estates. During the taxable years here in question no one made any objection to this action of the trustee, and he had the advice of counsel that under the terms of the trust it was his duty to distribute the full amount to those having life estates. The will made no specific provision for depreciation, and the general rule in such cases is that the life beneficiaries take all income undiminished by depreciа-

tion. In re Hoyt, 160 N. Y. 607, 55 N. E. 282; Devenney v. Devenney, 74 Ohio St. 96, 77 N. E. 688; Old Colony Trust Company v. Smith, Mass. , 165 N. E. 657; Blair v. Blair, 82 Kan. 464, 108 Pac. 827; Reed v. Longstreet, 71 N. J. Eq. 37, 63 Atl. 500; Dooley v. Penland, ... Tenn. ....., 300 S. W. 9. There is no reason to suppose that this testator in 1889 intended that the income from his estate should be reduced by depreciation before being distributed to the life beneficiaries. Gay v. Focke, 291 Fed. 721. No reserve [46] for depreciation was established or provided for by the trustee until several years after the taxable years involved. Then, apparently by mutual consent, a retroactive order of a Court was obtained as a result of which the trustee in January, 1929, for the first time, was enabled to show a reserve for depreciation of $622,-434.11 on his books although he had in his possession only $10,700 returned by the estate of Louise P. V. Whitcomb. Others to whom distributions had been made, including those who objected to the account, gave the trustee their notes bearing interest and payable only at the termination of the trust. These notes were supposed to restore to the trustee the balance of the amounts which had been distributed by him which in reality represented depreciation.

Louise P. V. Whitcomb, Charlotte A. W. Lepic and Marguerite T. Whitcomb were the petitioners in the case of Louise P. V. Whitcomb et al., 4 B. T. A. 80. That case involved the years 1917 to

1920. The petitioners there contended that under the same will which is involved in this case, the net income of the trust, the distributable share of which was taxable to the beneficiaries, was the statutory net income divided into the number of shares provided in the will. We there held, on April 23, 1926, that the life beneficiaries were taxable with their full distributable share of the income of the trust undiminished by depreciation. Marguerite T. Whitcomb appealed from the decision of the Board in that case as to the year 1918, to the Court of Appeals of the District of Columbia. The facts as to that year were similar to the facts before the Board in the present case. The Court in affirming the Board's decision, stated: [47]

> The appellant as life tenant in the trust estate was entitled to receive the full one-ninth of the income therefrom without regard to exhaustion or wear and tear of the corpus of the estate, and that is what appellant actually received from the trustee as her distributive share of the income. The trustee was not entitled to withhold any part of the income of the trust estate in order to make good the exhaustion or wear and tear of the capital assets of the estate; nor did the trustee in fact do so. Capital losses in such cases fall upon the reversioners or remaindermen, and not upon the life tenant. Therefore, the payment made by the trustee to appellant was in fact and law the distributive shares of the income to

which she was entitled as life tenant, and consisted in no part of capital depreciation restored to her. It was therefore taxable in her hands. This conclusion is not negatived by the fact that the trustee was entitled to enter deductions for capital losses or gains in his return for the trust estate as a single entity.

This decision of the Court was rendered on April 2, 1928. Prior thereto, on January 14, 1925, the Circuit Court of Appeals, First Circuit, had decided similarly in Baltzell v. Mitchell, 3 Fed. (2d) 428, cert. denied 268 U. S. 690. Thereafter, on September 5, 1928, the trustee filed the account and the question of his duty to reserve depreciation was raised for the first time. There was a close family relation between the life beneficiaries and the remaindermen who made the objections to the account. It is easily conceivable that the only benefit sought from the Probate Court proceeding was support for the position taken by the life beneficiaries in excluding from their income tax returns the amounts representing depreciation, and thus avoidance of the effect of the adverse decisions of this Board and of the Court of Appeals of the District of Columbia on their income tax liability for other years. During all of those years the petitioners actually received and enjoyed the amounts here in controversy, and during those years they had no reason to suppose that their enjoyment of these amounts would ever be ques-

tioned. The [48] only reason that even a semblance of question arose was because some of those persons who were enjoying the amounts, in effect, asked the Probate Court to hold that they had no right to enjoy them, and nobody objecting, the Court so held. Under such circumstances, I do not believe that they should be relieved from including as a part of their gross income the full amount which they received and enjoyed during each of the taxable years in question. Cf. Jackson v. Smietanka, 272 Fed. 970; Lucas v. American Code Company, 280 U. S. 445; Commissioner v. Sanford & Brooks, ... U. S. ..... If the trustee erred in failing to deduct depreciation before distributing the income of this trust, the error had its inception long prior to the taxable years in question and long prior to 1913. The amount returned to the trustee in 1928 and the amount of the notes delivered to him at that time, then represent only a part of the amounts erroneously distributed, and there was no reason for holding that it was the amounts they received in the taxable years which they returned. The order of the Court will, of course, have its effect prospectively upon distributions, but under the circumstances of this case I do not think it should be given retroactive effect to accomplish the purpose sought by these petitioners. Cf. Weiss v. Wiener, 279 U. S. 333; Rosenberger v. McCaughn, 25 Fed. (2d) 699.

SMITH, STERNHAGEN, PHILLIPS, ARUNDELL and BLACK agree with this dissent. [49]

United States Board of Tax Appeals,
Washington.

Docket No. 16120

ESTATE OF LOUISE P. V. WHITCOMB,
Deceased,

By

JOHN FREULER, Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to findings of fact and opinion promulgated February 11, 1931, the respondent herein, to-wit, on May 20, 1931, having filed a proposed redetermination for the period January 1 to June 14, 1921, and the petitioner on June 13, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

ORDERED AND RECEIVED that there is a deficiency for the period January 1 to June 14, 1921, in the amount of $95.61.

Enter.

Entered June 25, 1931.

(Signed) JOHN MARQUETTE,
Member.

A true copy. Teste, B. D. Gamble, Clerk U. S. Board of Tax Appeals. [50]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and John D. Foley, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner for review (hereinafter referred to as the Commissioner) is the duly appointed and qualified Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent (hereinafter referred to as the administrator) is an individual inhabitant of the City of San Francisco, State of California, and is the duly appointed and acting administrator of the Estate of Louise P. V. Whitcomb, deceased. Said Louise P. V. Whitcomb, hereinafter referred to as the taxpayer, was up to the date of her death, on June 14, 1921, a citizen and resident of the French Republic.

II.

The Commissioner determined a deficiency in income tax for the period from January 1, to June 14, 1921, in the amount of $723.60, and on March 23, 1926, in accordance with the provisions of sub-

division (a) of Section 283 of the Revenue Act of 1926, sent to said Louise P. V. Whitcomb by registered mail a notice of said deficiency. Thereafter the administrator duly appealed said notice of deficiency to the United States Board of Tax Appeals. Said appeal was heard by said Board on May 19, 1930. On February 11, 1931, said Board promulgated its interlocutory decision containing its findings of fact and opinion, and on June 25, 1931, entered its order of redetermination wherein it ordered and decided that there was a deficiency in income tax for the period from January 1, to June 14, 1921, in the amount of $95.61.

In the period from January 1, to June 14, 1921, said Louise P. V. Whitcomb was one of the beneficiaries of a trust established under the will of one A. C. Whitcomb, deceased. By the terms of said A. C. Whitcomb's will the income of the trust was required to be distributed among the beneficiaries thereof. During the calendar year 1921 the trust property sustained depreciation in the amount of $43,003.16. In distributing the [51] income of the trust among the beneficiaries, the trustee did not take into account the depreciation sustained by the property of the trust, but distributed to each beneficiary his or her proportionate part of the income of the trust without regard to any depreciation. The will of said A. C. Whitcomb was silent upon the question whether depreciation was to be taken into account in determining the income of the trust available for distribution among

the beneficiaries. On September 5, 1928, the trustee filed his account covering the period from February 23, 1913, to February 23, 1928, with the Superior Court for the City and County of San Francisco, California, together with a petition that the account be approved. The account was objected to by two of the remaindermen of the trust. On September 19, 1928, the Court entered a decree whereby it found that the trustee's action in not reserving necessary amounts for depreciation before distributing the income of the trust among the beneficiaries was improper and whereby it directed that the recipients of the income of the trust for the period from February 23, 1913, to February 23, 1927, pay back to the trustee the excess amounts received by them. The payment of $10,700.00 has been made on behalf of the Estate of Louise P. V. Whitcomb, but it does not appear from the record what year or years are covered by said payment.

III.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and order of redetermination promulgated and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision and order of redetermination and upon which he relies to reverse the said deci-

sion and order of redetermination so promulgated and entered by the Board of Tax Appeals, to-wit:

1. The Board erred in holding that the distributions made by the trustee to said Louise P. V. Whitcomb were not income to her in their entirety.

2. The Board erred in holding that the distributions of the income of the trust received by said Louise P. V. Whitcomb without diminution on account of depreciation sustained by the trust property were not taxable income to her in their entirety.

3. The Board erred in holding that a payment made in a subsequent year and not shown to have related to an alleged excessive depreciation in the taxable year had the effect of keeping any portion of the distribution in the taxable year from being income to the taxpayer.

4. The Board erred in holding that the decree of a Court passed in a subsequent year in a friendly suit to which the Government was not a party could affect the Government's right to income tax in the year in which the income was received.

5. The Board erred in not approving the deficiency proposed for assessment by the Commissioner. [52]

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the

clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

G. A. YOUNGQUIST,
Assistant Attorney General.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

United States of America,
District of Columbia—ss.

C. M. CHAREST, being duly sworn, says that he is General Counsel of the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

C. M. CHAREST.

Sworn and subscribed to before me this 21st day of December, 1931.

GEORGE W. KREIS,
Notary Public.

My commission expires November 12, 1932.

[Endorsed]: Filed December 22, 1931. [53]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: W. W. Spalding, Esq., Tower Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22nd day of December, 1931, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of December, 1931.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 22nd day of December, 1931.

.....,

Respondent on Review.

W. W. SPALDING,

Attorney for Respondent on Review.

RAL

[Endorsed]: Filed December 22, 1931. [54]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable John J. Marquette, Member of the United States Board of Tax Appeals, on May 19, 1930, in San Francisco, California. V. K. Butler, Jr., Esq., Alfred Sutro, Esq., and Felix T. Smith, Esq., appeared for the respondent and John D. Foley, Special Attorney, Bureau of Internal Revenue, appeared for the petitioner.

Whereupon

JAMES OTIS,

a witness for respondent, testified as follows:

Direct Examination.

My name is James Otis. My address is 2231 Broadway, San Francisco, California. I am an importer and exporter, a member of the firm of Otis-McAllister Company. I am sole trustee of the trust created by the will of A. C. Whitcomb and have been so since 1896. I am the sole trustee. I recall that in 1928 I had occasion to prepare an affidavit setting out in narrative form the history of the trust estate investments made from the time of the creation of the trust until November, 1928, when the affidavit was made.

The witness identified a copy of said affidavit. Said copy was thereupon admitted in evidence as

respondent's exhibit No. 1, and is hereto attached as Appendix 1.

In 1928 I filed an account as trustee in the Probate Department of the Superior Court in San Francisco having jurisdiction of this trust. That is the account. The statements contained in that account and all the items listed therein are a correct statement and report of my trusteeship and of the payments made by me under it.

Said account was thereupon admitted in evidence as respondent's exhibit No. 2 and is hereto attached as Appendix 2.

I filed a petition for settlement of the account.

[55]

The witness then identified the petition of James Otis for the settlement of his 14th account as trustee and it was admitted in evidence as respondent's exhibit No. 3. It is hereto attached as Appendix 3.

The witness then identified "Objections to the 14th Account of James Otis as trustee, filed on behalf of Napoleon Lepic and Charlotte de Rochechouart." Said objections were thereupon admitted in evidence as respondent's exhibit No. 4 and are hereto attached as Appendix 4.

The witness then identified his answer filed to the objections to his account, which said answer was admitted in evidence as respondent's exhibit No. 5 and is hereto attached as Appendix 5.

The witness then identified a decree of the Superior Court of the State of California in and

for the City and County of San Francisco, settling the 14th account of James Otis as trustee, which said decree was admitted in evidence as respondent's exhibit No. 6 and is hereto attached to Appendix 6.

The witness then identified an amended order and decree settling the account, which said amended order and decree was admitted in evidence as respondent's exhibit No. 7 and is hereto attached as Appendix 7.

(By Mr. BUTLER.)

Q. The order and the decree and the amended order and decree settling the account directed the trustee to demand and obtain from the beneficiaries repayments of certain sums representing the amount of the depreciation reserve required to be set up by the Court, but which was decreed to have been paid improperly to the beneficiaries. Did you demand and obtain repayment from the beneficiaries, Mr. Otis?

A. I did.

Q. I exhibit to you, Mr. Otis, four promissory notes, which I will subsequently describe in detail, and ask you to identify them.

A. I do.

Q. Did you receive these notes from the persons who are described therein?

A. I did.

Q. Are the sums for which the notes are made the respective proportionate amounts of the depre-

ciation which you had paid to the beneficiaries, and which they were required to repay to you? [56]

A. They are.

The promissory note of Louise A. F. E. Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 9 and is hereto attached as Appendix 9.

The promissory note of Marie Marguerite Thuret Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 10 and is hereto attached to Appendix 10.

The promissory note of Lydia Louise Ida Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 11 and is hereto attached as Appendix 11.

The promissory note of Charlotte Andree Whitcomb Lepic, dated January 17, 1929, payable to James Otis, in which note Napoleon Charles Louis Lepic and Charlotte de Rochechouart are named as joint makers, was then admitted in evidence as respondent's exhibit No. 8 and is hereto attached as Appendix 8.

The sums represented by these notes include the sums repayable to me with respect to the years 1921 to 1926. I also received a cash payment in

the amount of $10,700 from Mr. Freuler, the administrator of the estate of Mrs. Whitcomb, on behalf of said estate.

Mr. BUTLER.—Will it be stipulated that John Freuler, who is named in each of these promissory notes as attorney in fact of the respective makers was such attorney and is such attorney in fact? The original powers are on file with the Department, I believe.

Mr. FOLEY.—I so stipulate.

Mr. BUTLER.—The two notes which I have exhibited to Mr. Otis are two notes already introduced and identified, but they are signed by John Freuler, as guardian of Louise Ida Whitcomb and as guardian of Louise A. F. E. Whitcomb. Will it be stipulated that Mr. Freuler, as guardian, had authority to execute these notes and that he executed them as such guardian, and that the execution thereof was reported by him in his account in the matter of the guardianship proceedings in the Superior Court of San Francisco, and that the account was settled and the execution of the notes approved? I have certified copies of [57] the proceedings, and will be glad to exhibit them to counsel in support of the stipulation.

* * * * * * *

Mr. FOLEY.—That stipulation that you suggest is satisfactory.

On cross-examination the witness testified:

The only cash I have received from these beneficiaries is the payment of $10,700 from Mr. Freuler

as administrator of the estate of Louise P. V. Whitcomb. The others have given me notes which are payable at the termination of the trust. They have paid nothing on the notes up to date.

The Findings of Fact made by the Board of Tax Appeals insofar as they are not inconsistent with the foregoing are agreed to be correct and to be fully supported by substantial and competent evidence.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

W. W. SPALDING,
Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 12th day of April, 1932.

JOHN J. MARQUETTE,
Member, United States Board of Tax Appeals.

[58]

APPENDIX 1.

EXHIBIT 1.

AFFIDAVIT OF JAMES OTIS, TRUSTEE OF THE TRUST CREATED BY THE WILL OF A. C. WHITCOMB, DECEASED.

State of California,
City and County of San Francisco—ss.

James Otis, being first duly sworn, deposes and says:

That A. C. Whitcomb, deceased, by his last will, appointed one Jerome Lincoln trustee of the trust by said last will created, with power of appointment on the part of said Jerome Lincoln. That on or about the 3rd day of September, 1891, the said Jerome Lincoln, acting under his said power of appointment, by an instrument in writing, duly executed, given and made, appointed Winfield S. Jones, Jerome B. Lincoln and this deponent to be his successors in the said trust. That on or about the 23rd day of February, 1896, the said Jerome Lincoln died and the said Winfield S. Jones, Jerome B. Lincoln and this deponent became the trustees of said trust. That thereafter said Winfield S. Jones and said Jerome B. Lincoln died. That at all times since their deaths and since the year 1905, said James Otis has been the sole trustee of said trust.

That the last will and testament of said A. C. Whitcomb, deceased, was in the words and figures set forth in Exhibit "A," hereto annexed and made

a part hereof as completely as if herein particularly set forth. That the decree of final distribution of said estate in the Superior Court of the State of California, in and for the City and County of San Francisco, was in the words and figures set forth in Exhibit "B," hereto annexed and made part hereof as completely as if herein particularly set forth.

That on April 11, 1890, the lot and improvements at Pacific and Davis Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $70,000. That prior to the San Francisco fire of April, 1906, this deponent and his predecessor trustee, acting on behalf of the said trust, constructed improvements on said lot at a cost of $128,737., which were totally destroyed by said fire. That in the year 1906, and in the months of September, October and December, this deponent collected insurance in the total amount of $54,500. for damages to said improvements caused by said fire. That between December 7, 1906, and March 19, 1908, this deponent, acting as trustee of said trust, constructed a class "C" building on said lot at a cost of $176,852., said building having an estimated life of forty years. That between December 23, 1919, and January 20, 1920, this deponent, acting as trustee of said trust, constructed an additional improvement upon said lot at a cost of $3,294., which additional improvement will last only for the remaining life of the building.

That on April 11, 1890, the lot and improvements at Broadway and Front Street, San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $45,000. That said improvements were of slight value, and were destroyed by said fire of 1906. That no further improvements thereon were constructed by this deponent or his predecessor trustee prior to said San Francisco [60] fire. That on October 1, 1906, this deponent collected insurance in the amount of $4,900. for damages to said improvements caused by said fire. That in the year 1908 this deponent, acting as trustee of said trust, completed the construction of a building upon said lot, costing $122,846., said building having an estimated life of thirty-three and one-third years from said date. That between September 14, 1911, and January 24, 1913, this deponent, acting as trustee of said trust, constructed additional improvements thereto at a cost of $3,262., which improvements will last only for the remaining life of the building. That on May 6, 1919, said building was damaged by fire. That on January 21, 1919, this deponent, acting as trustee of said trust, completed the restoration of said building at a cost of $3,172.

That on April 11, 1890, the lot at Front and Green Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, was of the value of $45,000. That said lot remained in an unimproved condition at all times from said date until the San Francisco fire

of April, 1906. That between December 9, 1919, and January 20, 1920, this deponent, acting as trustee of said trust, constructed improvements upon the said lot at a cost of $25,408. That said improvements have an estimated life of thirty-three and one-third years from date of completion.

That on April 11, 1890, the lot and improvements at Market and Eighth Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $400,000. That prior to said San Francisco fire this deponent and his predecessor trustee, acting on behalf [61] of said trust, constructed improvements upon said lot at a cost of $118,259., which were destroyed by said fire. That in the year 1906, and in the months of September, October and December, this deponent collected insurance in the aggregate amount of $59,600. for damages to said improvements caused by said fire. That between June 5, 1906, and October 20, 1906, this deponent, acting as trustee of said trust, constructed improvements on said lot at a cost of $68,606. That between November 17, 1910, and May 26, 1913, this deponent, acting as trustee of said trust, constructed additional improvements on said lot at a cost of $713,385. That between March 31, 1916, and December 28, 1921, this deponent, acting as trustee of said trust, constructed additional improvements on said lot, costing $502,009. That between November 3, 1922, and December 30, 1924, this deponent, acting as trustee of said trust, constructed addi-

tional improvements on said lot at a cost of $295,238. That between March 14, 1923, and December 30, 1924, this deponent, acting as trustee of said trust, constructed additional improvements on said lot at a cost of $335,145. That said improvements are in the nature of a hotel with an estimated life of sixty years from March, 1917.

That in June, 1917, this deponent, acting as trustee of said trust, acquired improved property at Market and Eighth Streets, in San Francisco, in cancellation of the debt of a note of $163,000., and additional advances and costs in excess of $15,000. That the total value of said building was estimated to be $110,000., with an estimated life of eleven years from the date of acquirement.

That on November 21, 1917, this deponent, acting as trustee of said trust, acquired the Hotel Carlton, at Turk and Larkin Streets, San Francisco, by foreclosure proceedings in cancellation of a debt of $150,649., of which over $110,000 [62] is estimated as the cost of the building, said building having an estimated life of forty years from the date of acquisition thereof. That in 1920, during the months of January and February, this deponent received $160,000. from the sale of said lot and improvements.

That on November 21, 1917, this deponent acquired a lot on Grant Avenue fifty-seven feet north of Clay Street, in San Francisco, by foreclosure proceedings in cancellation of a debt of

$55,000. That on the same date this deponent sold said lot and received in exchange, in part payment, improved properties at 829 Broderick Street and 1622 McAllister Street, San Francisco. That the cost of the buildings on each of said lots to this deponent is estimated at $3,750. with an estimated life of ten years from the date of acquisition thereof. That on March 12, 1925, this deponent, acting as trustee of said trust, sold said property for $15,000.

That between the years 1916 and 1920, inclusive, this deponent, acting as trustee of said trust, purchased an auto bus and hotel furniture and fixtures at a cost in excess of $212,000.

That on March 23, 1917, and on January 7, 1920, this deponent, acting as trustee of said trust, sold water lots at Van Ness Avenue and Lewis Street, in San Francisco, for $29,000. and $38,000., respectively.

That most of the aforesaid assets and improvements were acquired and constructed by this deponent and/or his predecessor trustee, with proceeds derived from the conversion and sale of other capital assets of said trust. That most of the capital assets so sold and converted were bonds, mortgages [63] and other nonwasting and nondepreciating assets.

That on February 23, 1906, the following assets were held and possessed by this deponent as trustee of said trust.

That on said date this deponent, as trustee of said trust, owned bonds of the aggregate value of $1,762,000.

That on said date this deponent, as trustee of said trust, owned corporate stocks of an aggregate value of $83,482.50.

That on said date this deponent held $76,424.92, in cash for the account of said trust.

That on said date this deponent had $35,000. on deposit in savings banks for the account of said trust.

That on said date this deponent held promissory notes and mortgages due and owing to said trust in the aggregate amount of $1,126,000.

That on said date this deponent, as trustee of said trust, owned, in addition to the lots mentioned above and included in Exhibit "B," state title lands in San Francisco, valued at $1,200., Lake Merced lots, in San Francisco, valued at $6,300., and additional Northbeach lots, in San Francisco, valued at $11,150.

That between February 23, 1906, and the present date, all of the aforesaid promissory notes and mortgages, save one for $66,000., have matured and have been collected or foreclosed by this deponent as trustee of said trust, and all of said bonds have been sold or collected.

That at the present date the assets owned and held by this deponent as trustee of said trust consist almost entirely of improved real estate.

That at the present date the only unimproved real [64] estate held by this deponent as trustee of said trust consists of a lot at Front and Green Streets, San Francisco.

That at the present time the only promissory notes or mortgages held by this deponent, as trustee of said trust, consist of a mortgage in the sum of $66,000.

That at the present time the only bonds or securities held by this deponent, as trustee of said trust, consist in Spring Valley Water Company bonds in the amount of $15,000., and stock of Colusa County Bank, California, in the amount of $98,915.

That the aforesaid nondepreciable property consisting of unimproved realty, bonds, corporate stocks, bank deposits, cash on hand, promissory notes, and mortgages included among the assets of said trust on February 23, 1906, the aggregate value of which upon said date was $3,101,557.42, and the proceeds thereof, has practically all been applied in the erection and purchase of depreciating property consisting of improvements upon real property of said trust, and hotel furniture.

JAMES OTIS,
Trustee.

Subscribed and sworn to before me this 12th day of November, 1928.

[Seal] CHALMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California. [65]

EXHIBIT "A."

I, Adolphus Carter Whitcomb of the City and County of San Francisco, State of California, United States of America, but temporarily stopping in Paris, France, do make this my last Olographic Will and Testament.

1st. I give to the San Francisco Protestant Orphan Asylum and to the Ladies Protection & Relief Society, both of said San Francisco, each the sum of Five Thousand Dollars, making in all the sum of Ten Thousand Dollars.

2nd. I give to Mrs. Sarah Brazer Berry, now or formerly of Washington City, D. C., the sum of Five Thousand Dollars; and, in addition, I release her from all indebtedness to me or my estate for her kindness to my brother and myself, after the May fire of 1861 at said San Francisco.

3rd. I give to Adolphus Darwin Tuttle of Hancock, New Hampshire, and to Henry Foster Whitcomb of Boston, Massachusetts, or to the survivor of them, One Hundred Thousand Dollars of my Chesapeake & Ohio Railroad Bonds to be held by them in *Trust,* nevertheless, to pay over semi-annually to my cousin Love Maria Whitcomb Willis, now or lately of Glenora, Yates County, New York, and to her daughter Edith, now or lately married, or to the survivor of them during their natural lives, the income therefrom, for their own separate use and behoof, free from the debts, charge or control of their husbands, with the remainder

or remainders thereof to their children, or grandchildren "per stirpes," if any be alive at the time of their death, and if none be alive, then the said remainder shall go to my heirs-at-law.

4th. I give to my wife, Louise Palmyre Vion Whitcomb, Two Hundred Thousand Dollars ($200,000) of my Chesapeake & Ohio Railroad [66] Bonds, and I recommend her not to dispose of them, or to convert them, without the distinct advice of my friend, Mr. Bruce.

5th. I give to the town of Hancock, New Hampshire, for the maintaining of a free, public and un-sectarian library Ten Thousand Dollars of my Chesapeake & Ohio Railroad Bonds, and, also, to the said town the further sum of Ten Thousand Dollars of said Bonds, one-half thereof, or such part by the said one-half as may be considered necessary, for the reclamation and embellishment of the "Common," so-called in the village of said Hancock, and the rest of said Ten Thousand Dollars as a fund, of which the income shall be used for the increase and maintenance of said reclamation and embellishment.

6th. I give to my nephew the said Adolphus Darwin Tuttle and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, whether real, personal or mixed, in the "Jimeno Rancho" so-called, wholly or partly in the Counties of Colusa and Sutter in said California, in all mortgages, contracts, debts or dues arising therefrom.

And I recommend to my said nephew to leave his portion thereof after his own death and the death of his wife, in *Trust* for the said Charles Whitcomb Tuttle and to his children, or descendants, if any be alive at the time of the death of his said son; and if there *by* none so alive, to Harvard College, Cambridge, Massachusetts, one-half of the income thereof, to be used by said College for the assistance of students of said College to complete their regular course therein, and the other half of the income thereof for the general uses of the College, apart, however, from any participation therein by the Divinity School. [67]

7th. I give to my hereinafter named Executor, Jerome Lincoln of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature, and not hereinbefore disposed of, after the payment of my debts, in *Trust,* nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb, one-third part of the interest thereof or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her: one Adolph, born on or about the 23rd day of February, 1880, and the other Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three third parts to the descendants "per stirpes" of the said two children, if any be alive at the time of the death of the said two children: and if none be alive at that time, to Harvard Col-

lege, in conformity with the provisions named or indicated in Section Six (6) of this Will, having reference to said Harvard College.

The said Lincoln is hereby authorized to pay out of said two-thirds parts, only such portion as he may deem meet, fit and proper for the education and maintenance of the two children, until they shall have arrived respectively at the age of twenty-one years, after which they shall be entitled to receive their portion of the yearly income or interest. And the said Lincoln is hereby authorized to appoint his successor or successors in this Trust.

Lastly, I hereby nominate the said Jerome Lincoln and the said Adolphus Darwin Tuttle as Executors of this Will, and I hereby expressly provide that no bond or bonds shall be required of them or either of them, for the performance of any duties under this will; and I hereby recognize the said two children of the said [68] Louise Palmyre Vion Whitcomb, born as aforesaid in or about 1880 and in or about 1882, as my children, and authorize them to take and bear my name.

IN WITNESS WHEREOF I have hereunto set my hand and seal to this Will, after having effaced the word "said" in the 11th line of the third page of this Will, all in my hand-writing, and upon six pages, numbered from one to six, this 11th day of July, One thousand Eight hundred and Eighty-seven (1887) at Paris, France.

Signed and Sealed in the presence of us, and in the presence of each other, who at the request of

the said A. C. Whitcomb, have hereunto set our hands the day and year last above written.
[Seal] ADOLPHUS CARTER WHITCOMB.
E. J. DE STA MARINA of San Francisco, Cala.
W. PEMBROKE FELRIDGE, Paris, France.
WM. F. NAST, St. Louis, Missouri. [69]

EXHIBIT "B."

In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of
A. C. Whitcomb,
Deceased.

DECREE.

Jerome Lincoln and Adolphus Darwin Tuttle, executors of the will of Adolphus Carter Whitcomb, the above named decedent, having heretofore, to wit: on the 24th day of March, 1890, rendered and filed herein a true account and report of their administration of said estate, which account was for final settlement, and having filed with said account a petition praying that said account be settled, allowed and approved by this Court, and that final distribution of said estate be made to the persons entitled thereto; and said petition coming on regularly to be heard on the 7th day of April, 1890, proof having been made to the satisfaction of the Court that due and legal notice of the hear-

ing of said petition for settlement of said account and final distribution had been given according to law and in the manner and for the time heretofore ordered and directed by the Court, and the hearing of application for final distribution having been regularly continued until this day;

NOW, on this 11th day of April, 1890, it appearing to the Court that all claims and debts against said decedent, all taxes on said estate, and all debts, expenses and charges of [70] administration of said estate have been fully paid and discharged by the said executors; and it appearing that under and in accordance with the order and decree of this Court made on the 30th day of September, 1889, the executors have paid over, distributed and delivered to the several legatees under said will the legacies in said will bequeathed to them respectively, to wit:

To the San Francisco Protestant Orphan Asylum and to the Ladies' Protection and Relief Society, both of San Francisco, California, each the sum of Five Thousand ($5,000) Dollars.

To Mrs. Sarah Brazer Berry, of Washington, D. C., the sum of Five Thousand ($5,000) Dollars.

To Adolphus Darwin Tuttle, of Hancock, New Hampshire, One Hundred Thousand ($100,000) Dollars of Chesapeake and Ohio Railroad Bonds, to hold the same as sole trustee for the benefit of Love Maria Whitcomb Willis, cousin of the testator, of Glenora, Yates County, New York, and her daughter Edith, upon the trust in said will set forth,

Henry Foster Whitcomb, named in said will as co-trustee with said Tuttle, having declined to act as such trustee, and having refused and renounced said trust.

To Louise Palmyre Vion Whitcomb, widow of the testator, Two Hundred Thousand ($200,000) Dollars of the Chesapeake and Ohio Railroad Bonds.

To the town of Hancock, New Hampshire, Twenty Thousand ($20,000) Dollars of said Chesapeake and Ohio Railroad Bonds, upon the trust and for the purposes in said will set forth.

And it appearing that said estate has now been fully administered by said executors, and that all the steps in said administration have been regularly had and taken and that said estate is now ready for distribution and in a condition to be closed.

And it further appearing that at the time of making and [71] balancing the final account so rendered the residue of money in the hands of the executors was the sum of Eighty Thousand Six Hundred and Fifty-five 19/100 ($80,655.19) that the executors have since received the sum of Seventeen Hundred and Eighty-four 87/100 Dollars, and disbursed the sum of Twenty-one Thousand Five Hundred and Forty-seven 30/100 Dollars as appears by the supplemental account filed herewith, leaving a balance now in the hands of the executors of Sixty Thousand Eight Hundred and Ninety-two 78/100; and

it appearing that the said supplemental account is true and correct and supported by proper vouchers.

And it appearing that of the real and personal property so ready for distribution in the hands of the executors a part consists of thirty-one forty-eighths (31-48) parts of the real property known as the "Jimeno Rancho," as particularly described in the inventory, together with the W. ½ of the S. W. ¼ of section 11; and the E. ½ of the S. E. ¼ of section 10; and the N. E. ¼ of N. E. ¼ of section 15, township 12 N., R. 1 E., which had been purchased by the decedent and the said Hagar with moneys arising from the "Jimeno Rancho," and had been by them incorporated with and made a part of said ranch and of 31-48 parts of the mortgages, contracts, moneys, debts and dues arising therefrom, now standing of record in the name of George Hagar, of Colusa, and ready to be conveyed by the said Hagar, according to his declaration of trust, made by him in writing, to the proper devisees of the said will, and includes moneys therefrom already paid into the hands of the executors by the said George Hagar, which last described moneys amount to the sum of Thirty-one Thousand (31,000) Dollars, all of which interest in the "Jimeno Rancho" and mortgages, contracts, moneys, debts and dues are hereinafter particularly described.

And it further appearing that the said will of said de- [72] cedent contained among other the following clause:

"6. I give to my nephew, the said Adolphus Darwin Tuttle, and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, whether real, personal or mixed, in the 'Jimeno Rancho', so called, wholly or partially in the Counties of Colusa and Sutter in said California, in all mortgages, contracts, debts or dues arising therefrom, and I recommend to my said nephew to leave his portion thereof, after his own death and the death of his wife, in trust for the said Charles Whitcomb Tuttle and to his children or descendants, if any be alive at the time of the death of his said son; and if there be none so alive, to Harvard College, Cambridge, Massachusetts; one-half of the income thereof to be used by said college for the assistance of students of said college to complete their regular course therein, and the other half of the income thereof for the general uses of the college, apart howfrom any participation therein by the Divinity School."

And application having been made to this Court to make a construction of the said clause of the will and to adjudge and determine in its decree of final distribution whether the one-half part of the interest of the decedent in and to the real and personal property of the said "Jimeno Rancho" is, by the said will, devised and bequeathed to the said Adolphus Darwin Tuttle in fee simple absolute, without restraint upon his power of alienation, or whether the recommendation in the said clause contained creates a trust binding upon him and

operating to create a remainder after his death and the death of his wife in favor of Charles Whitcomb Tuttle, his children or descendants, or Harvard College: and the Court at the said hearing of the petition for final distribution having heard and considered the claims of the respective parties argued by Edward J. Pringle, Esq., and Jerome [73] B. Lincoln, Esq., who appeared for the said Adolphus Darwin Tuttle, and claimed that the devise to him was absolute and without trust or restriction upon his power of alienation, and Sidney V. Smith, Esq., who appeared for the adverse parties, claiming that a trust was imposed upon the said Adolphus Darwin Tuttle, and a remainder created after the death of the said Adolphus Darwin Tuttle and his wife; and testimony having been taken in open Court and argument of counsel had on behalf of the respective parties, and the Court being fully advised in the matter;

And it further appearing that in and by his said will the decedent devised and bequeathed all the rest and residue of his property, real, personal and mixed, excepting what property the decedent had in France, to the said Jerome Lincoln, upon the trust hereinafter by this decree declared and imposed;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that said supplemental account be, and the same is, hereby settled and approved, and it is further ordered, adjudged and decreed that the executors retain out of the

funds in their hands the sum of Fifty Dollars for payment of Clerk's fees and other expenses of closing the estate.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that thirty-one forty-eighths (31-48ths) of the real property in the Counties of Colusa and Yolo known as the "Jimeno Rancho," and of the mortgages, contracts, moneys, debts and dues arising, or that may arise therefrom, and the said sum of Thirty-one Thousand Dollars already paid therefrom into the hands of the executors by the said George Hagar be, and the same are, hereby distributed to the said Adolphus Darwin Tuttle and his son Charles Whitcomb Tuttle, of Hancock, New Hampshire, in fee simple absolute, to their own use and benefit, in equal shares. And the said George [74] Hagar, being present in open Court and admitting the trust aforesaid in favor of the devisees of the said will, is ordered, decreed and directed to make conveyance of the legal title thereof to the said Adolphus Darwin Tuttle and Charles Whitcomb Tuttle in fee simple absolute; the interest in the said "Jimeno Rancho" so distributed, and to be by the said Hagar conveyed, being described as follows:

Thirty-one forty-eighths (31-48) parts of Twenty-two Thousand and Sixty-one 08-100 Dollars ($22,061 08-100), the same being the moneys now in the hands of said George Hagar and arising from said "Jimeno Rancho."

LANDS IN THE COUNTY OF COLUSA.

The undivided thirty-one forty-eighths (31-48) parts of lands in the County of Colusa, State of California, being parts of the rancho known as the "Jimeno Rancho" standing in the name of George Hagar, of Colusa, bounded and described as follows:

1st. Tract of land commencing at a point where the western boundary line of the Jimeno Rancho, as patented by the United States, intersects the boundary line between the Counties of Yolo and Colusa, and running thence eastwardly, along the line between the said counties to the Sacramento River; thence northwardly up the said river and following the meanderings thereof until the same intersects the northern boundary line of township 13 north, range 1 east, Mount Diablo B. and M.; and running thence westwardly, along said township line until the same intersects the western boundary line of the Jimeno Rancho; and thence along said western boundary line to the point of commencement; containing 6,809 acres more or less.

2nd. Tract of land commencing at the southwest corner of Sect. 34, T. 14 N., R. 1 E., M. D. B. & M.; and running thence [75] eastwardly, along the southern line of Section 34, and the southern line of Section 35 of same township to the Sacramento River; and running thence northwardly up the Sacramento River, and following the meandering thereof to the line running east and

west, and intersecting Section 35 in the middle of said section; thence westwardly along the said middle line of Section 35 and the middle line of Section 34 to the western line of said Section 34; and thence southwardly along the westerly line of Section 34, to the place of commencement; being the south half of Section 34, the southwest quarter of Section 35, and the fractional southeast quarter of Section 35, as marked on the official surveys of the United States, containing 514 acres, excepting therefrom 4 acres sold to Reclamation District No. 108, and situated at the southeast corner of fractional southeast quarter of said Section 35, bounding upon the west base of the levee along the Sacramento River and the southerly boundary line of Section 35.

3d. Tract of land commencing at a point on the Sacramento River at the northeast corner of lands of George Woods, being near the middle east and west line of Section 13, Township 15 North, Range 1 West, M. D. M. B .& M., and running thence westwardly along said Woods' north line and the north line of Kilgore to the county road leading from Colusa to Meridian, near the middle east and west line of Section 14, same Township and Range; thence westwardly along said road and continuation thereof in a straight line to western boundary line Jimeno Patent in same Section 15; thence north a little more than 1½ miles to N. W. corner of Section 10, same Township and Range; thence east ½ mile along the south line of lands of Totman

& Tuson; thence north a little more than a mile to Sacramento River; thence down along and with the said river to a point of commencement; containing 2,366 acres.

4th. Tract of land commencing at northeast corner of southeast quarter of Section 9, Township 15 North, Range 1 West, M. D. B. & M.; thence westwardly ½ mile to the center of Section 9; thence [76] northwardly nearly 1½ miles along the eastern boundary line of lands of Peter Dolan to the Sacramento River; thence down along and with the Sacramento River about ½ mile to lands of ..... Tuson; thence southwardly along the west line of said lands of ..... Tuson to the northwest corner of Section 10, same Township and Range, thence south ½ mile to point of commencement, containing 427 and 66-100 acres.

5th. Tract of land commencing at northwest corner of Section 8, Township 15 North, Range 1 West, M. D. B. & M.; thence east along the northern boundary line of said section ½ mile; thence south along the eastern boundary line of the northwest quarter of Section 8 one-fourth of a mile; thence east through the middle of the northeast quarter of Section 8, and by a continuation in a straight line a little more than ½ mile to county road leading from Colusa to Meridian; thence in a general northwesterly direction along and with the center of said road a little more than ¾ of a mile to the southerly line of a tract of land of 1,280 acres,

known as the Belden Tract; thence northwestwardly along the said line of said Belden Tract about ¾ of a mile to lands of T. Marr; thence south about ¾ of a mile to point of commencement, containing 380 acres.

6th. Tract of land commencing at a point on the Sacramento River within Section 7, Township 16 North, Range 2 West, M. D. B. & M., which is the southeasterly corner of lands of Jo. Hamilton; thence west along the southerly line of said lands of Hamilton about 1½ miles to the county road leading from Colusa to Princeton; thence southerly and southeasterly along said county road about 1¾ miles to lands of J. B. de Jarnatt; thence northeasterly about 1¼ miles to the Sacramento River; thence up said river to point of commencement, containing about 1,100 acres. [77]

7th. Tract of land commencing at a stake marked L. M. 1 on the Sacramento River, on the dividing line between the Jimeno Rancho and the rancho known as Larkin's Children's Ranch; and running thence southwardly down the Sacramento River and along the meanderings thereof to a sycamore tree marked L. M. 8, in Section 24 of Township 17 North, Range 2 West, M. D. B. & M.; and thence due west to the western boundary line of the Jimeno Rancho of same township; thence north along said line of said Rancho 90 and 7-100 chains to the said dividing line between the Jimeno Rancho and the rancho of Larkin's children; and

thence eastwardly along said dividing line 131 and 30-100 chains to the point of commencement, containing 1,305 acres.

8th. Tract of land commencing at a point where the northerly line of Levee Street, as laid down on the Town Map of the Town of Colusa, intersects the county road from Colusa to Princeton, and running thence northwardly along said county road 825 feet to Sacramento River; thence southeastwardly down the said river, and following the meanderings thereof, to the point where the said river is intersected by the said northerly line of Levee Street, and thence westwardly along the said northerly line 770 feet to the point of commencement, containing 7¼ acres.

LANDS IN THE TOWN OF COLUSA.

The undivided thirty-one forty-eighths (31-48) parts of the following lands in the Town of Colusa, State of California, as per Official Map of the Town of Colusa, being portions of the Jimeno Rancho, all standing in the name of George Hagar, of Colusa: [78]

Whole Block	Block	1
Lots 2, 3, 4, 6, 7 and 8	"	2
" 1 and 2	"	3
" 6, 7 and 8	"	8
" 2, 3 and 8	"	9
" ½ interest in 4	"	9
Whole Block	"	10

Lots 1, 3 and 4	Block	12
" ½ interest in 2	"	12
" 3, 4 and 8	"	14
" 2 and 6	"	15
" ½ interest in 5 and 7	"	15
" 6 and 7	"	17
" 1, 2, 3, 5, 6 and 7	"	21
" 1, 2, 3 and 8	"	23
" ½ interest in 5	"	23
" 1, 2, 3, 4, 7 and 8	"	24
Whole Block	"	25
Lots 5, 6, 7 and 8	"	26
" 4	"	27
" ½ interest in 5 and 8	"	27
" 1, 3 and 4	"	28
" ½ interest in 2	"	28
" ½ interest in 1	"	29
" ½ interest in 1	"	30
" 4 and west half of 3	"	31
" west ½ of 1, 19 and 12 of east side of 2	"	32
" south ½ of 5 and east ½ of 6	"	32
Whole Block	"	37
Whole Block	"	38
Lots 1, 2, 3, 5, 6 and 8	"	39
" ½ interest in 4 and 7	"	39
" ½ interest in 8	"	41
" 8	"	45
Lots 8	"	46
" 8	"	47
" ½ interest in 6 and 7	"	47

Lots 6, 7 and 8	Block	48
" 3, 4, 5, 6, 7 and 8	"	49
" 1, 3, 4, 5, 6, 7 and 8	"	50
" 1, 2, 3, 5, 6, 7 and 8	"	51
" ½ interest in 4	"	51
" 2, 3, 4, 5, 6, 7 and 8	"	52
" 3, 5, 6, 7 and 8	"	53
" ½ interest in 1 and 4	"	53
" 3, 5, 6, 7 and 8	"	54
" ½ interest in 8	"	57
" 3, 4 and 6	"	58
" ½ interest in 7	"	58
" ½ interest in 7	"	59
" 3, 4, 5, 6, 7 and 8	"	60
½ interest in Whole Block	"	61
Whole Block	"	62
Lots, 1, 4, 5, 7 and 8	"	63
" ½ interest in 3 and 6	"	63
" 1, 2, 3, 4, 5, 6 and 8	"	64
" ½ interest in lot 7	"	64
" 1, 2, 3, 4, 5 and 7	"	65
" ½ interest in 6 and 8	"	65
Whole Block	"	66
Lots 1, 2, 5, 6 and 7	"	67
" 6	"	68
" 7	"	70
" ½ interest in 8	"	70

[79]

Lots 6	Block	71
Whole of Block	"	73
Whole of Block	"	74

Lots 1, 2, 3, 6 and 8	Block	75
Lots ½ interest in 4, 5 and 7	"	75
Whole of Block	"	76
Whole of Block	"	77
Whole of Block	"	78
Whole of Block	"	79
Lots 5, 6, 7 and 8	"	80
" 5, 6 and 7	"	81
" 7 and 8	"	82
" ½ interest in 2, 3 and 6	"	82
Whole of Block	"	83
" "	"	84
" "	"	86
" "	"	87
" "	"	88
" "	"	89
½ interest in Block	"	90
Whole of Block	"	91
Lots 2, 5, 6, 7 and 8	"	92
" 1, 2, 3, 5, 6 and 8	"	95
" ½ interest in 4 and 7	"	95
Whole of Block	"	96
" "	"	97
" "	"	98
" "	"	99
" "	"	100
Lots 2, 5, 7 and 8	"	101
" ½ interest in 1, 3, 4 and 6	"	101
Whole of Block	"	102
" "	"	103
" "	"	104

Whole of Block ..... Block 105
" " ..... " 106
" " ..... " 107
" " ..... " 108
" " ..... " 109
" " ..... " 110
" " ..... " 111
" " ..... " 112
" " ..... " 113
" " ..... " 114
" " ..... " 115
" " ..... " 116
" " ..... " 117
" " ..... " 118
" " ..... " 119
" " ..... " 120
" " ..... " 121
" " ..... " 122
" " ..... " 123
" " ..... " 124
" " ..... " 128
" " ..... " 129
" " ..... " 130
" " ..... " 131
½ interest in whole of ..... " 132

[80]

Whole of Block ..... Block 133
" " ..... " 134
" " ..... " 135
" " ..... " 136
" " ..... " 137

Whole of Block		Block	141
"	"	"	142
"	"	"	143
"	"	"	144
"	"	"	145
"	"	"	146
"	"	"	147
"	"	"	148
"	"	"	149
"	"	"	150

LANDS IN THE COUNTY OF YOLO.

The undivided thirty-one forty-eighths (31-48) parts of the following lands situated in the County of Yolo, State of California, standing in the name of George Hagar, of Colusa.

That certain piece or parcel of land, bounded and described as follows, to wit: Commencing at a point on the west bank of the Sacramento river where the same is intersected by the township line dividing townships 12 and 13 north, range 1 east, M. D. B. and M., also being the dividing line between the counties of Colusa and Yolo; thence running down along and with said river to a point where said river is intersected by a line running north and south through the center of Sec. 30, township 12 north, range 2 east; thence running south through the center of said Sec. 30, and by a continuation and in a straight line through a portion of Sec. 31, same township and range, to a slough known as "Sycamore Slough," said slough being the back or

westerly boundary line of the Jimeno Rancho; thence northwesterly along and with said slough and the back or westerly boundary line of said rancho to the north line of Sec. 22 in township 12 north, range 1 east, M. D. B. and M.: thence north 1¾ miles; thence west, ½ mile; thence north ¼ mile; thence west, ½ mile; thence north one mile to said township line between the counties of Colusa and Yolo, and thence east [81] along said township line to the point of commencement. Excepting therefrom five hundred and twenty-nine and six one hundredths acres, now or lately of J. P. Bullock, being the south ½ of south ½ of section 2; the south ½ of south ½ of section 3, and southeast ¼ of southeast ¼ of section 4, all in township 12 north, range 1 east, M. D. B. and M., and the irregular tract bounded on the north and east by the Sacramento river, and on the south by the Sacramento river and the southern boundary line of section 1, in the same township; and on the west by the western boundary line of said section 1. The said tract of land containing, after deducting the said exceptions, 5,615.54 acres.

The undivided thirty-one forty-eighths (31.48) parts of following promissory notes secured by mortgage:

Note of M. A. and O. J. Kilgore to Geo. Hagar for $1,326.68 for moneys due by said Kilgores, being debt arising from Jimeno Rancho, dated November 1st, 1883—$4,582., due one-third Nov. 1st, 1884-85-86, bearing interest, etc., 9 per cent. per annum,

balance due $1,326.68. The same being secured by mortgage upon portion of Jimeno Ranch sold to mortgagor.

Note of S. R. Murdock to Geo. Hagar for $200, for moneys due by said Murdock, being debt arising from Jimeno Ranch, dated Feb. 15th, 1888, due 12 months from date, bearing interest at ten (10) per cent. per annum, balance due Oct. 1st, 1889, $234. The same being secured by mortgage upon a portion of Jimeno Rancho sold to mortgagor.

Note of Jno. W. Browning to Geo. Hagar, for $13,367, for moneys due by said Browning, being debt arising from Jimeno Rancho, dated Oct. 31st, 1885, $32,300, due balance in 1889-90-91, bearing interest at 9 per cent. per annum, balance due Oct. 1st, 1889, $13,367,—$5000 paid Oct. 12th, 1889. The same being secured by [82] mortgage upon portion of Jimeno Rancho sold to mortgagor.

Note of E. G. Morton to Geo. Hagar for $14,000, for money due by said Morton, being debt arising from Jimeno Rancho, dated October 23rd, 1888, due 1889-90-91, bearing interest at 9 per cent. per annum, balance due, $14,000. The same being secured by mortgage upon portion of Jimeno Rancho sold to mortgagor.

Note of H. J. Thomas to Geo. Hagar for $600, for moneys due by said Thomas, being debt arising from Jimeno Rancho, dated Dec. 29th, 1888, due 1889-90-91, bearing interest at 10 per cent. per annum; balance due $600. The same being secured

by mortgage upon portion of Jimeno Rancho sold to mortgagor.

The undivided thirty-one forty-eighths (31-48) part of the following promissory notes:

Note of E. J. Sabin to Geo. Hagar for $500, for moneys due by said Sabin, being debt arising from Jimeno Rancho, dated Dec. 5th, 1888, due Dec. 6th, 1888, bearing interest at 10 per cent. per annum; balance due, $500.

Note of D. C. Kilgore to Geo. Hagar for $46.47, for moneys due by said Kilgore, being debt arising from Jimeno Rancho, dated Nov. 3d, 1887, due Nov. 4th, 1887, bearing interest at 10 per cent. per annum; balance due $46.47.

Note of J. C. Frasier to Geo. Hagar for $138, for moneys due by said Frasier, being debt arising from Jimeno Rancho, dated Dec. 31st, 1887, due January 1st, 1888, bearing interest at 10 per cent. per annum; balance due, $138.

Note of M. Wallrath to Geo. Hagar for $270, for moneys due by said Wallrath, being debt arising from Jimeno Rancho, dated Oct. 10th, 1888, due Oct. 11th, 1888, bearing interest at 8 per cent per annum; balance due $270. [83]

Note of S. S. Hine to Geo. Hagar for $97.55, for moneys due by said Hine, being debt arising from Jimeno Rancho, dated Feb. 25th, 1889, due Feb. 26th, 1889, bearing interest at 10 per cent per annum; balance due, $97.55.

Note of E. J. Morton to Geo. Hagar for $177.92 for money due by said Morton, being debt arising from Jimeno Rancho, dated Oct. 23rd, 1888, due Oct. 24th, 1888, bearing interest at 9 per cent per annum; balance due, $177.92.

The undivided thirty-one forty-eighth (31-48) parts of the following amounts due by sundry parties to Geo. Hagar for account of Jimeno Rancho, being debts arising from Jimeno Rancho, as follows, to-wit: From

Colusa Milling Co., accrued September 5th, 1889, $502.50

Adolph Entremont, accrued September 1st, 1889, $352.50

Cooper, accrued June 1st, 1889, $60.

D. N. Angier, accrued October 15th, 1888, balance due, $206.34

T. Marr, accrued February, 1889, $525.00

J. B. Danner, accrued February, 1889, $492.66

Colusa & L. R. R., accrued July and September, 1889, $508.84

The undivided thirty-one forty-eighths (31-48) part of the following lots of grain, product of the Jimeno Rancho:

1,197 sacks wheat, 162,960 pounds in Howell Davis' warehouse

824 sacks wheat, 117,930 pounds, same warehouse.

690 sacks of wheat, Mumma Bros.

533 " barley, Mumma Bros.

397 " " M. E. Phillips

300	sacks	barley, S. W. Boyer
333	"	wheat, S. W. Boyer
130	"	barley, J. M. Miller
516	"	wheat, J. M. Miller
2,261	"	" C. M. Mumma
289	"	barley, C. M. Mumma
504	"	wheat, Vincy
151	"	barley, Vincy
316	"	wheat, J. C. Frasier
526	"	barley, J. C. Frasier
708	"	barley, A. E. Potter
559	"	wheat, A. E. Potter

Together with thirty-one forty-eighths (31-48) parts of any other mortgages, contracts, moneys, debts or dues arising or that may arise from the said "Jimeno Rancho" and not herein particularly described.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that [84] all the rest and residue of the estate of said decedent, real, personal or mixed, of every kind and nature, now known or hereafter discovered, except what property the decedent may have in France, the said property in France never having come into the possession of the said executors, be, and the same is hereby distributed to Jerome Lincoln, of San Francisco, State of California, in trust, nevertheless, to pay over to the said wife of said decedent, Louise Palmyre Vion Whitcomb, one-third part of the interest thereof or income therefrom, for and dur-

ing her natural life, and the other two-thirds parts to the children of said decedent born of her—one, Adolphe Whitcomb, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree Whitcomb, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants per stirpes of the said two children, if any be alive at the time of the death of the said two children, and if none be alive at that time to Harvard College, Cambridge, Massachusetts, one-half of the income thereof to be used by said college for the asistance of students to complete their regular course therein, and the other half of the income thereof for the general uses of the college—apart, however, from any participation therein by the Divinity School; but the said Jerome Lincoln is hereby authorized to pay out of said income only such portion as he may deem meet, fit and proper for the education and maintenance of the said two children until they shall arrive at the age of twenty-one years, after which time they shall be entitled to receive their portions of the yearly income or interest.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Jerome Lincoln be, and he is, hereby authorized to appoint a successor or successors in this trust. [85]

The following is a particular description of said rest and residue of said estate, so distributed to said Jerome Lincoln: $29,842.76/100 being balance of

moneys, to-wit: $60,842.76 less $31,000. distributed to A. D. and C. W. Tuttle.

REAL PROPERTY.

Lands in the City and County of San Francisco, State of California.

1st. Lot of land, commencing at the southeast corner of Davis and Pacific Streets, and running thence eastwardly along the southerly line of Pacific street one hundred and thirty-seven feet and six inches, thence at right angles southwardly one hundred and twenty feet to the northerly line of Clark street, thence westwardly along the said line of Clark street one hundred and thirty-seven feet and six inches to the easterly line of Davis street, and thence northwardly along said line of Davis street one hundred and twenty feet to the point of commencement.

2nd. Lot of land, commencing at the southeast corner of Broadway and Front streets, and running thence eastwardly along the southerly line of Broadway street ninety-one feet and eight inches, thence at right angles southwardly one hundred and twenty feet to the northerly line of Chambers street, thence westwardly along said line of Chambers street ninety-one feet and eight inches to the easterly line of Front street, and thence northwardly along said line of Front street one hundred and twenty feet to the point of commencement.

3rd. Lot of land, commencing at the southwest corner of Front and Green streets, and running

thence southwardly along the westerly line of Front street ninety-one feet and eight inches, thence at right angles westwardly two hundred and seventy-[86] five feet to the easterly line of Battery street, thence northwardly along said line of Battery street forty-five feet and ten inches, thence at right angles eastwardly one hundred and thirty-seven feet and six inches, thence at right angles northwardly forty-five feet and ten inches to the southerly line of Green street; thence eastwardly along said southerly line of Green street one hundred and thirty-seven feet and six inches to the point of commencement; being Beach and Water lots Nos. 2, 7 and 8.

4th. Lot of land, commencing at a point on the southeasterly line of Market street, distant thereon seventy-five feet southwestwardly from the southerly corner of Market and Eighth streets, running thence southwestwardly along said line of Market street two hundred feet; thence at right angles southeastwardly two hundred and seventy-five feet; thence at right angles northeastwardly one hundred and fifty-five feet, thence at right angles northwestwardly one hundred and five feet to the northwesterly line of Stevenson street; thence northeastwardly along said line of Stevenson street forty-five feet; thence at right angles northwestwardly one hundred and seventy feet to the point of commencement; being a portion of Block 414.

5th. Lot of land, commencing at the southeast corner of Van Ness Avenue and Lewis street, and running thence eastwardly along the southerly line

of Lewis street three hundred and eighty-four feet to the westerly line of Polk street; thence southwardly along said line of Polk street one hundred and thirty-seven feet and six inches; thence at right angles westwardly three hundred and eighty-four feet to the easterly line of Van Ness avenue, and running thence northwardly, along said line of Van Ness avenue one hundred and thirty-seven feet and six inches to the point of commencement; being the northern ½ of Western Addition Block No. 35. [87]

6th. Lot of land, commencing at the southeast corner of Van Ness avenue and Jefferson street, and running thence eastwardly along the southerly line of Jefferson street three hundred and eighty-four feet to the westerly line of Polk street; thence southwardly along said line of Polk street one hundred and thirty-seven feet and six inches; thence at right angles westwardly three hundred and eighty-four feet to the easterly line of Van Ness avenue; and running thence northwardly, along said line of Van Ness avenue, one hundred and thirty-seven feet and six inches to the point of commencement; being the northern half of Western Addition Block No. 37.

7th. Lot of land, commencing at point where the northerly line of Lewis street intersects the westerly line of Polk street extended northward; and running thence westerly, along the northerly line of Lewis street four hundred and twelve feet and six inches to the easterly line of Van Ness avenue extended northwardly; thence northwardly, along said extended line of Van Ness avenue to Ship's chan-

nel; thence at right angles eastwardly along Ship's channel four hundred and twelve feet and six inches to the westerly line of Polk street as extended northwardly; and thence southwardly, along said extended line of Polk street to the point of commencement.

8th. Lot of land, commencing at the southwest corner section 35, township 2 south, range 6 west; thence north, 40 chains; thence east, 15.83 chains; thence south, 40 chains; thence east, 15.83 chains; thence south, 40 chains; thence west, 15.83 chains to point of commencement; containing 63.32 acres, according to the official surveys of the United States.

9th. Lots of land, being Lots numbers four hundred and twenty-one (421), four hundred and twenty-two (422) and four hundred and twenty-three (423), of Gift Map number four (4), as delineated in the official surveys of the City and County of San Francisco.

10th. Lots of land, being the State title or reversionary title [88] of Lots numbers nineteen (19), thirty-nine (39) and forty-three (43) of the City Slip property of the City and County of San Francisco, as delineated upon the map of the official survey of said City and County.

PERSONAL PROPERTY.

Bonds and Script.

No. 1. 1230 First Mortgage gold bonds of the reorganized Chesapeake and Ohio Railway Co., of $1,000 each, bearing interest at 5 per cent. per annum and payable in fifty years.

No. 2. 1201 Richmond and Danville R. Co., debenture bonds of $1,000 each, due in 1927, bearing interest at the rate of 6 per cent. per annum, cumulative.

No. 3. 288 Richmond and Danville consolidated mortgage gold bonds of $1,000 each, due in 1936, bearing interest at the rate of 5 per cent. per annum.

Script on above without interest, par value $240.

No. 4. 325 Richmond and West Point Terminal Railway and Warehouse Co. gold trust bonds of $1,000 each, due in 1897, bearing interest at the rate of 6 per cent per annum.

No. 5. Central Trust Co. of New York, certificate of deposit of first mortgage bonds of the Shenandoah Valley Railroad Co. under plan of reorganization, par value $18,000.

No. 6. 12 First Mortgage 7% Land Grant and Sinking Fund Gold Bonds of the New Orleans, Baton Rouge and Vicksburg Railroad Co., at $1,000 each, due in 1902.

STOCK OF INCORPORATED COMPANIES.

100 shares of the capital stock of the Bank of California, in the name of Jerome Lincoln.

271 shares of the capital stock of Colusa Co. Bank stock, in the name of A. C. Whitcomb. [89]

Three (3) shares of the capital stock of the Colusa and Lake Railroad Company, in the name of A. C. Whitcomb, of par value of $100 each.

2,000 shares of 110 each, of the Tumacacori Mining and Land Company (Limited), certificate in name of Charles P. Posbon, not endorsed.

10 shares of Gold Canon Consolidated Mining Company, in the name of Jerome Lincoln.

4,310 shares of Gold Canon Consolidated Mining Company, in the name of A. C. Whitcomb.

95 shares of the capital stock of the Rock Island Gold and Silver Mining Company.

50 shares of the capital stock of the Bella Union Gold and Silver Mining Company.

300 shares of the capital stock of the La Grange Ditch and Hydraulic Mining Company.

200 shares of the capital stock of Eugene L. Sullivan Mining Company.

100 shares of the capital stock of the Chase and Cornwall Silver Mining Company.

25 shares of the capital stock of the La Esperanza Mining Company.

53 shares of the capital stock of the "420" Mining Company.

15 shares of the capital stock of the Echo Gold and Silver Mining Company.

10 shares of the capital stock of the St. Francis Precious Metal Mining Company.

141 shares of the capital stock of the Union Gold and Silver Mining Company.

240 shares of the capital stock of the Techattucup Silver and Gold Mining Company.

501 shares of the capital stock of the San Francisco Dock and Wharf Company. [90]

56 shares of the capital stock of the Die Vernon Silver Mining Company.

272½ shares of the capital stock of the Echo Extension Gold and Silver Mining Company.

2000 shares of the capital stock of the South Feather Water and Union Mining Company, standing in name of Jerome Lincoln.

Sixty-six (66) coupons of California War Bonds, being coupons of twenty-two (22) bonds, and being coupons No. three (3) due on January 1st, 1855; coupons No. four (4) due January 1st, 1856, and coupons No. five (5) due January 1st, 1857, amounting in all to the sum of $2,519.87.

Three (3) city warrants of the City of San Francisco for $1,000 each, issued and made payable to Jesse L. Wetmore for grading Powell Street, and made payable for delinquent taxes under the act

of May 30th, 1861, two of said warrants bearing date April 20th, 1854, and one bearing date September 20th, 1854.

PROMISSORY NOTES.

Note of E. L. Sullivan to Jerome Lincoln, dated August 1st, 1876, for $8,485.90, bearing interest at one per cent. per month; renewed May 1st, 1880.

Note of H. Gibbons to A. C. Whitcomb, dated September 1st, 1882, for $500, payable
bearing interest at the rate of

Dated, April 11th, 1890.

J. V. COFFEY,
Judge. [91]

APPENDIX 2.

EXHIBIT TWO.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

No. 7871 Old Series
No. 50,794 New Series

FOURTEENTH ACCOUNT OF JAMES OTIS, TRUSTEE UNDER THE WILL OF A. C. WHITCOMB, DECEASED, FROM FEBRUARY 23, 1903, TO FEBRUARY 23, 1928.

February 23, 1903, to February 23, 1904.

	Income Received	$183,369.46
	Expenses paid	62,757.84
1904		
February 23	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account of Mrs. Louise Palmyre Vion Whitcomb	40,203.88
" "	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account Countess Charlotte Andree Whitcomb Lepic	40,203.87

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1904			
February 23	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account Adolphe Whitcomb	$ 40,203.87	
February 23, 1904, to February 23, 1905.			
	Income received	179,026.37	
	Expenses paid	47,475.41	
1905			
February 21	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account Mrs. Louise Palmyre Vion Whitcomb	43,850.32	
" "	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account Countess Charlotte Andree Whitcomb Lepic	43,850.32	
" "	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account of Adolphe Whitcomb	43,850.32	
February 23, 1905 to February 23, 1906.			
	Income received	187,543.97	
	Expenses paid	48,882.87	
1906			
February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Adolphe Whitcomb	46,220.36	

February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Mrs. Louise Palmyre Vion Whitcomb	$ 46,220.37
1906		
February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Countess Charlotte Andree Whitcomb Lepic	46,220.37
February 23,	1906, to February 23, 1907.	
	Income received	165,711.10
	Expenses paid	48,074.69
1907		
February 23	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Mrs. Louise Palmyre Vion Whitcomb	39,212.14
" "	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Countess Charlotte Andree Whitcomb Lepic	39,212.14
" "	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Adolphe Whitcomb	39,212.13

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February 23, 1907, to February 23, 1908.		
	Income received	$164,123.33
	Expenses paid	45,537.60
1908		
February 23	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Mrs. Louise Palmyre Vion Whitcomb	39,528.58
" "	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Countess Charlotte Andree Whitcomb Lepic	39,528.58
" "	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Adolphe Whitcomb	39,528.57
February 23, 1908, to February 23, 1909.		
	Income received	183,129.13
	Expenses paid	49,157.53
1909		
February 23	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Mrs. Louise Palmyre Vion Whitcomb	44,657.20
" "	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Countess Charlotte Andree Whitcomb Lepic	44,657.20

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1909		
February 23	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Adolphe Whitcomb	$ 44,657.20
February 23, 1909 to February 23, 1910.		
	Income received	$196,960.44
	Expenses paid	51,334.30
1910		
February 23	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account Mrs. Louise Palmyre Vion Whitcomb	48,542.05
" "	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account Countess Charlotte Andree Whitcomb Lepic	48,542.05
" "	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account, Adolphe Whitcomb	48,542.04
February 23, 1910, to February 23, 1911.		
	Income Received	197,134.18
	Expenses paid	50,856.30
1911		
February 23	To one-third of $146,277.88, balance, account Income Account from February 23, 1910, to February 23, 1911,	

	credit account Mrs. Louise Palmyre Vion Whitcomb	48,759.30

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1911		
February 23	To one-third of $146,277.88, balance account Income Account from February 23, 1910, to February 23, 1911, credit account Countess Charlotte Andree Whitcomb Lepic	$ 48,759.29
" "	To one-third of $146,277.88, balance account Income Account from February 23, 1910, to February 23, 1911, credit account Adolphe Whitcomb	48,759.29
February 23, 1911, to February 23, 1912.		
	Income received	183,291.02
	Expenses paid	45,560.72
1912		
February 23	To one-third of $137,730.30, balance account Income Account from February 23, 1911, to February 23, 1912, credit account Mrs. Louise Palmyre Vion Whitcomb	45,910.10
" "	To one-third of $137,730.30, balance account Income Account February 23, 1911, to February 23, 1912, credit account Countess Charlotte Andree Whitcomb Lepic	45,910.10
" "	To one-third of $137,730.30, balance account Income Account from February 23, 1911, to February 23, 1912, credit account Adolphe Whitcomb	45,910.10

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February 23, 1912, to February 23, 1913.

Income received	$202,451.14
Expenses paid	51,569.82

1913

February 23	To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Mrs. Louise Palmyre Vion Whitcomb	50,293.78
"	" To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Countess Charlotte Andree Whitcomb Lepic	50,293.77
"	" To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Adolphe Whitcomb	50,293.77

February 23, 1913, to February 23, 1914.

Income received	211,432.07
Expenses paid	52,032.63

1914

February 23	To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Mrs. Louise Palmyre Vion Whitcomb	53,133.15
"	" To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Countess Charlotte Andree Whitcomb Lepic	53,133.15

1914			
February 23	To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Adolphe Whitcomb	$ 53,133.14	
February 23, 1914, to February 23, 1915.			
	Income received		211,302.86
	Expenses paid		50,927.64
1915			
February 23	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Mrs. Louise Palmyre Vion Whitcomb	53,458.41	
" "	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Countess Charlotte Andree Whitcomb Lepic	53,458.41	
" "	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Adolphe Whitcomb	53,458.40	
February 23, 1915, to February 23, 1916.			
	Income received		208,773.81
	Expenses paid		47,186.05
1916			
January 26	To amount credited "Undivided Income Account," as per account, being one-third of $120,338.28, balance account from February 23, 1915, to November 23, 1915	40,112.76	

February 23	To amount credited "Undivided Income Account," one-third of $41,249.48, [99] balance income for quarter ending February 23, 1916	$ 13,749.82
1916		
February 23	To one-half of $107,725.18, balance account Income Account February 23, 1916, credit account Mrs. Louise Palmyre Vion Whitcomb	53,862.59
" "	To one-half of $107,725.18, balance account Income Account February 23, 1916, credit account Countess Charlotte Andree Whitcomb Lepic	53,862.59
February 23, 1916, to February 23, 1917.		
	Income received	149,239.38
	Expenses paid	42,944.74
1917		
February 23	To one-third of $106,294.64, balance account Income Account from February 23, 1916, to February 23, 1917, credit account Mrs. Louise Palmyre Vion Whitcomb	35,431.55
" "	To one-third of $106,294.64, balance account Income Account from February 23, 1916, to February 23, 1917, credit account Countess Charlotte Andree Whitcomb Lepic	35,431.55
" "	To one-third of $106,294.64, balance account Income Account from February 23, 1917, credit account Undivided Income Account	35,431.54

February 23, 1917, to February 23, 1918.

Income received	119,585.75
Expenses paid	24,274.83

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1918

February 23	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account Mrs. Louise Palmyre Vion Whitcomb	$ 31,770.31
" "	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account Countess Charlotte Andree Whitcomb Lepic	31,770.31
" "	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account J. Henry Meyer, Administrator Estate of Adolphe Whitcomb, deceased	31,770.30

February 23, 1918, to February 23, 1919.

Income received	131,806.61
Expenses paid	33,827.62

1919

February 23	To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Mrs. Louise Palmyre Vion Whitcomb	32,659.66

February 23,	To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Countess Charlotte Andree Whitcomb Lepic	32,659.67
" "	To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Estate of Adolphe Whitcomb, deceased	32,659.66

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February 23, 1919, to February 23, 1920.

	Income received	$152,693.72
	Expenses paid	43,661.63

1920

February 24	To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Mrs. Louise Palmyre Vion Whitcomb	36,344.03
" "	To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Countess Charlotte Andree Whitcomb Lepic	36,344.03
" "	To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Estate of Adolphe Whitcomb, deceased	36,344.03

February 23, 1920, to February 23, 1921.

	Income received	174,693.95
	Expenses paid	46,414.11
1921		
February 23	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Mrs. Louise Palmyre Vion Whitcomb	42,759.94
" "	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Countess Charlotte Andree Whitcomb Lepic	42,759.95

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" "	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Estate of Adolphe Whitcomb, deceased	$ 42,759.95

February 23, 1921, to February 23, 1922.

	Income received	125,989.70
	Expenses paid	51,947.10
1922		
February 23	To balance account Mrs. Louise Palmyre Vion Whitcomb Income from February 23 to May 23, 1921	7,551.50
" "	To one-third of $42,437.15) To four-ninths of $31,605.45), balance income account from February	

	23, 1921, to February 23, 1922, credit account Countess Charlotte Andree Whitcomb Lépic	28,192.59
February 23	To one-third of $42,437.15) To four-ninths of $31,605.45), balance Income Account from February 23, 1921, to February 23, 1922, credit account Estate of Adolphe Whitcomb, deceased	28,192.58
" "	To balance account Income Account from November 23, 1921, to February 23, 1922, credit account Estate of Louise P. V. Whitcomb, deceased	1,751.81
" "	To balance Income Account, amount in hands of trustee for account Estate of Louise P. V. Whitcomb, deceased, or whom it may concern	8,354.12

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February 23, 1922, to February 23, 1923.

	Income received	$145,509.32
	Expenses paid	70,550.28
1923		
February 23	To four-ninths of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit account Countess Charlotte Andree Whitcomb Lepic	33,315.13
" "	To four-ninths of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit	

	account Estate of Adolphe Whitcomb, deceased	33,315.13
February 23	To one-ninth of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	8,328.78
February 23,	1923, to February 23, 1924.	
	Income received	153,347.88
	Expenses paid	68,368.45
1924		
February 23	To four-ninths of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Countess Charlotte Andree Whitcomb Lepic	37,768.63
" "	To four-ninths of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Estate of Adolphe Whitcomb, deceased	37,768.63

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1924		
February 23	To one-ninth of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Estate of Louise Palmyre Vion Whitcomb, deceased	$ 9,442.17

February 23, 1924, to February 23, 1925.		
	Income received	149,182.71
	Expenses paid	61,870.85
1925		
February 23	To four-ninths of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Countess Charlotte Andrée Whitcomb Lepic	38,805.26
" "	To four-ninths of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Estate of Adolphe Whitcomb, deceased	38,805.26
" "	To one-ninth of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	9,701.34
February 23, 1925, to February 23, 1926.		
	Income received	146,399.92
	Expenses paid	65,295.55
1926		
February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Countess Charlotte Andree [105] Whitcomb Lepic	$ 37,108.71
1926		
February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Estate of Adolphe Whitcomb, deceased	37,108.70

February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	6,886.96
February 23, 1926, to February 23, 1927.		
	Income received	147,430.42
	Expenses paid	75,515.49
1927		
February 23	To balance Income Account from February 23, 1926, to February 23, 1927, credit account Countess Charlotte Andree Whitcomb Lepic	35,957.46
" "	To balance Income Account from February 23, 1926, to February 23, 1927, credit account Estate of Adolphe Whitcomb, deceased	35,957.47
February 23, 1927, to February 23, 1928.		
	Income received	146,171.27
	Expenses paid	73,576.76
1928		
February 23	To balance Income Account from February 23, 1927, to February 23, 1928, credit account Countess Charlotte Andree Whitcomb Lepic	36,297.25

[106]

1928		
February 23	To balance Income Account from February 23, 1927, to February 23, 1928, credit account Estate of Adolphe Whitcomb, deceased	$ 36,297.26

Dated, August 28, 1928.

JAMES OTIS,
Trustee. [107]

State of California,
City and County of San Francisco.—ss.

James Otis, being duly sworn, deposes and says: I am the surviving trustee under and by the will of said A. C. Whitcomb, deceased. The foregoing account being filed as and for the fourteenth account of the trusteeship of the trust estate created by said will is in all respects just and true, and according to the best of my knowledge, information and belief, contains a full, true and particular account of all receipts and disbursements on account of said trust estate from the 23rd day of February, 1903, to the 23rd day of February, 1928, and of all sums of money belonging to said trust estate and of all property real and personal, which have come into the hands of the trustees or which have been received by any other person or persons by my order or authority, and I do not know of any error or omission in the said account to the prejudice of any person or persons interested in said trust estate.

JAMES OTIS.

Subscribed and sworn to before me this 28th day of August, 1928.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [108]

APPENDIX 3.

EXHIBIT 3.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series
No. New Series

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

PETITION FOR SETTLEMENT OF FOURTEENTH ACCOUNT OF TRUSTEE.

The petition of James Otis, as trustee under the will of A. C. Whitcomb, deceased, respectfully shows:

That he is the surviving trustee of the trust created by the will of the above named decedent.

That said will was admitted to probate in the above entitled Court and estate of said decedent distributed upon certain trusts in said will set forth, and that your petitioner is the surviving trustee of said trusts.

That at various times your petitioner and his predecessors, as such trustee, filed their accounts in said Court and that said accounts were settled by said Court. That the last account so filed and settled was the thirteenth annual account of your petitioner as such trustee covering the period from February 23, 1902, to February 23, 1903, and settled, allowed

and approved by the Hon. J. V. Coffee, April 7, 1903. That all of said proceedings were had and taken prior to the fire of April 18, 1906, and that all the records of said proceedings in the above entitled Court have been destroyed. [109]

That subsequent to said thirteenth annual account, your petitioner filed in the above entitled Court no accounts as such trustee, but such accounts were rendered annually in writing to the beneficiaries of said trusts and accepted by them.

That the account filed herewith as the fourteenth account of your petitioner shows the amount of the receipts and disbursements of your petitioner, as such trustee, during the twenty-five years commencing February 23, 1903, and ending February 23, 1928. That the details of said receipts and disbursements are set forth in said accounts annually rendered to the beneficiaries of said trust and in the books and records of your petitioner. That said details are voluminous and that it is not practical for your petitioner to present said details or file them in this Court, but that your petitioner offers to produce the same in Court upon the hearing of this petition, and prays that they be deemed to constitute a part of said account as so filed.

WHEREFORE, your petitioner prays that the account filed herewith may be settled, allowed and approved as filed.

PILLSBURY, MADISON & SUTRO,
Attorneys for Petitioner. [110]

APPENDIX 4.

EXHIBIT 4.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series
No. 50,794 New Series

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

OBJECTIONS TO THE FOURTEENTH ACCOUNTS OF JAMES OTIS, TRUSTEE.

Napoleon Charles Louis Lepic and Charlotte de Rochechouart oppose the allowance and approval of the fourteenth account of James Otis, as trustee under the will of A. C. Whitcomb, deceased, filed in the above entitled matter, and by way of objection to said account respectfully show:

1. That opponents are beneficiaries of the trust under the will of said decedent and entitled, upon the termination of said trust, to take and receive, intact, from the trustee one quarter each of the trust estate.

2. That a great part of said trust estate is, and has been throughout the years 1913 to 1927, inclusive, invested in buildings and improvements subject to deterioration and depreciation and which have deteriorated and depreciated in value as follows:

Year	Amount
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
Carried forward	101,817.00 [111]
Brought forward	$101,817.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00
Total depreciation	$622,434.11;

that no reserves or other provision for such depreciation have been made by the trustee from the gross income of the trust estate; that said sum of $622,434.11 has been paid out by the trustee to the beneficiaries of said trust entitled to the income thereof, as income, thus impairing in a like amount the principal of the trust estate; and that said sum of $622,434.11 is included in the payments to income beneficiaries set up in said fourteenth account and for which the trustee takes credit therein.

3. That upon sales of bonds and real property of the trust estate losses have been sustained as follows:

In 1922	$ 4,812.50
1923	22,955.19
1925	1,875.58
Total losses	$29,643.27

reducing the capital in said amount; that the trustee has made no provision out of the gross income of the trust estate to make good such losses of capital; and that the whole of [112] said gross income has been paid out by the trustee, according to said fourteenth account.

WHEREFORE, opponents pray that the trustee be charged with $622,434.11 for depreciation and $29,643.27 for losses suffered by the principal of the trust estate.

W. H. LAWRENCE,
Attorney for Opponents.

State of California,
City and County of San Francisco.—ss.

W. H. Lawrence being duly sworn, says that he is the attorney of Napoleon Charles Louis Lepic and Charlotte de Rochechouart, the opponents who present the foregoing objections in the above entitled matter; that the said objections are true; that both of the said opponents are absent from the City and County of San Francisco, where deponent

resides and has his office, and for that reason deponent makes this verification.

W. H. LAWRENCE.

Signed and sworn to before me this 6th day of September, 1928.

[Seal] MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California. [113]

APPENDIX 5.

EXHIBIT 5.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

No. 7871 Old Series,
No. 50,794 New Series.

ANSWER OF TRUSTEE TO OBJECTIONS TO FOURTEENTH ACCOUNT.

James Otis, as trustee under the will of A. C. Whitcomb, deceased, answering the objections of Napoleon Charles Louis Lepic and Charlotte de Rochechouart to his fourteenth account on file herein, admits, denies and alleges as follows:

I.

Admits the allegations in paragraph 1.

II.

Admits the allegations in paragraph 2, and in this behalf alleges that the disbursements made in said fourteenth account were made without deduction of reserves or other provision for the depreciation mentioned in said paragraph, under and pursuant to the advice of counsel learned in the law retained by said trustee, to the effect that under and

by virtue of the terms of said trust it was the duty of said trustee to make such disbursements without such deduction; that said trustee does not know now whether said advice was correct or not, and prays that this Court may decide upon the correctness of said claim [114] so advanced by objectors herein, for the future guidance of said trustee; that by reason of the fact that these payments have been made for many years without objection, in good faith and on the advice of counsel, it is neither fair, just nor equitable that said trustee be charged on account thereof, save and except to the extent that trustee may be able to reclaim from the recipients of said disbursements such amount as the Court may hold to have been erroneously paid to them.

III.

Admits the allegations of paragraph 3, and in this behalf alleges that since the creation of said trust, large gains and profits have been made through sales and other dealings in bonds and real property of the estate, and that said profits have been applied in increasing the capital of said trust estate; that such increases in the capital of said trust estate amount to a sum largely in excess of the amount stated in said paragraph, $29,643.27, and that if said sums mentioned in said paragraph are to be deducted from the income of the trust estate, then said other sums largely exceeding them are to be added to the amount distributable as in-

come of said trust estate, and the capital thereof reduced accordingly.

PILLSBURY, MADISON & SUTRO,
Attorneys for Trustee. [115]

State of California,
City and County of San Francisco.—ss.

James Otis, being first duly sworn, deposes and says: That he is the trustee named in the foregoing answer, that he has read said answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters, that he believes it to be true.

JAMES OTIS.

Subscribed and sworn to before me this 11th day of September, 1928.

[Seal] FRANK L. OWEN,
Notary Public, in and for the City and County of San Francisco, State of California. [116]

APPENDIX 6.

EXHIBIT 6.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series.
No. 50,794 New Series.

In the Matter of the Estate of
A. C. WHITCOMB,

Deceased.

ORDER AND DECREE SETTLING ACCOUNT.

James Otis, as Trustee under the will of A. C. Whitcomb, deceased, having on the 5th day of September, 1928, rendered for settlement his fourteenth account of his administration of said trust for the period from the 23rd day of February, 1903, to and including the 23rd day of February, 1928, and Napoleon Charles Louis Lepic and Charlotte de Rochechouart having on the 7th day of September, 1928, filed their objections in writing to the said account, and said account and said objections coming on regularly to be heard this 19th day of September, 1928, proof having been made to the satisfaction of the court that notice of the filing and hearing of said account has been given as required by law, and proof having been made and the court now finding that said account is in all respects full, true and correct, except as hereinafter stated:

It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon

Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, [117] as set forth in said objection, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, according to the rates of depreciation as prescribed and used by the Government of the United States in connection with federal income tax returns, said amount for each of said respective years being as follows, to wit:

Year	Amount
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account

without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said trust it was [118] the duty of said Trustee to make such disbursements without such deduction; that said Trustee in making said disbursements without such deduction was entitled to rely upon the said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or does attach to said Trustee or to said James Otis by reason of having made said disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED and DECREED that the recipients of the income of said trust estate during the period from February 23, 1913, to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in the said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive, by making, executing and delivering to said Trustee their respective promissory notes, payable without

interest at the termination of said trust to the order of the remaindermen under said trust as they may be determined to be at the time of the termination of said trust.

It is further ORDERED, ADJUDGED and DECREED that from and after the year ending February 23, 1927, and until the termination of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper. [119]

It is further ORDERED, ADJUDGED and DECREED that the objection contained in the third paragraph of the objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart, with reference to losses sustained on sales of bonds and real property, be, and the same is hereby, disallowed.

Done in open court this 19th day of September, 1928.

FRANK H. DUNNE,
Judge. [120]

APPENDIX 7.

EXHIBIT 7.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series.
No. 50,794 New Series.

In the Matter of the Estate of
A. C. WHITCOMB,

Deceased.

AMENDED ORDER AND DECREE SETTLING ACCOUNT.

James Otis, as Trustee under the will of A. C. Whitcomb, deceased, having on the 5th day of September, 1928, rendered for settlement his fourteenth account of his administration of said trust for the period from the 23rd day of February, 1903, to and including the 23rd day of February, 1928, and Napoleon Charles Louis Lepic and Charlotte de Rochechouart having on the 7th day of September, 1928, filed their objections in writing to the said account, and said account and said objections coming on regularly to be heard this 19th day of September, 1928, and Alfred Sutro, Esq., having appeared as counsel for James Otis, trustee under the will of A. C. Whitcomb, deceased, and W. H. Lawrence, Esq., having appeared as counsel for Napoleon Charles Louis Lepic and for Charlotte de Rochechouart, and Aylett R. Cotton, Esq., having appeared as counsel for John Freuler, as guardian

of the estate of Louise Adolphine France Emmanuelle Whitcomb, a nonresident minor, as guardian of the estate of Lydia Louise Ida Whitcomb, a nonresident minor, and as administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, and Clarence Shuey, Esq., having appeared as counsel for Countess Charlotte Andree Whitcomb Lepic and for [121] Marguerite Thuret Whitcomb, and Rufus Hatch Kimball, Esq., having appeared as counsel for Harvard College, and proof having been made to the satisfaction of the court that notice of the filing and hearing of said account has been given as required by law, and proof having been made and the court now finding that said account is in all respects full, true and correct, except as hereinafter stated:

It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objection, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to wit:

Year	Amount
1913	$23,751.00
1914	23,070.00

Year	Amount
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

[122]

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said trust it was the duty of said Trustee to make such disbursements without such deduction; that said Trustee in making said disbursements without such deduction was entitled to rely upon the said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or

does attach to said Trustee or to said James Otis by reason of having made said disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED AND DECREED that the recipients of the income of said trust estate during the period from February 23, 1913 to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in the said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive.

It is further ORDERED, ADJUDGED AND DECREED that from and after the year ending February 23, 1927, and until the termination [123] of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper.

It is further ORDERED, ADJUDGED and DECREED that the objection contained in the third paragraph of the objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart,

with reference to losses sustained on sales of bonds and real property, be, and the same is hereby, disallowed.

Done in open Court this 19th day of September, 1928.

FRANK H. DUNNE,
Judge [124]

APPENDIX 8.

EXHIBIT 8.

$305,867.06 San Francisco, California, January 17, 1929.

For value received we, jointly and severally, promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust, to pay the sum of Three Hundred Five Thousand, Eight Hundred Sixty-Seven and 06/100 dollars ($305,867.06) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

CHARLOTTE ANDREE WHITCOMB LEPIC,
NAPOLEON CHARLES LOUIS LEPIC,
CHARLOTTE DE ROCHECHOUART,
By JOHN FREULER,
Their Attorney in Fact. [125]

APPENDIX 9.

EXHIBIT 9.

$118,353.85 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust to pay the sum of One Hundred Eighteen Thousand, Three Hundred Fifty-three and 85/100 Dollars ($118,353.85) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

LOUISE A. F. E. WHITCOMB,
By JOHN FREULER,
Her Guardian. [126]

APPENDIX 10.

EXHIBIT 10.

$639,159.35 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust to pay the sum of Sixty-Nine Thousand, One Hundred Fifty-Nine and 35/100 Dollars ($69,159.35) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

MARIE MARGUERITE THURET WHITCOMB,
By JOHN FREULER,
Her Attorney in Fact. [127]

APPENDIX 11.

EXHIBIT 11.

$118,353.85 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust, to pay the sum of One Hundred Eighteen Thousand, Three Hundred Fifty-Three and 85/100 Dollars ($118,353.85) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

LYDIA LOUISE IDA WHITCOMB,
By JOHN FREULER,
Her Guardian.

[Endorsed]: Filed April 12, 1932. [128]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals

for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board,
   (a) Petition, including annexed copy of deficiency letter.
   (b) Answer.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence as settled and allowed.

6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record. (Not included in Transcript.)

7. This praecipe.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 13th day of April, 1932.

[Seal] W. W. SPALDING,
Attorney for Respondent.

[Endorsed]: Filed April 14, 1932. [129]

[Title of Court and Cause.]

CLERK'S CERTIFICATE
TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 129, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 25th day of April, A. D. 1932.

[Seal] B. D. GAMBLE,
Clerk.

[Endorsed]: No. 6835. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner vs. John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, Respondent. Transcript of the Record. Upon Petition to Review the Decision of the United States Board of Tax Appeals.

Filed May 4, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6835

United States
Circuit Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb,
Respondent.

Upon Petition to Review the Decision of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-eighth day of November in the year of our Lord one thousand nine hundred and thirty-two.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable CHARLES C. CAVANAH, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Wm. Cutler Thompson, Special Assistant to the United States Attorney General, counsel for the petitioner, and by Mr. Felix T. Smith, counsel for respondent, and submitted to the Court for consideration and decision, with leave to counsel for respective parties to file further briefs 20 + 10.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the ninth day of January in the year of our Lord one thousand nine hundred and thirty-three.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed and that a judgment be filed and recorded in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS.

Before: WILBUR and SAWTELLE, Circuit Judges, and CAVANAH, District Judge.

CAVANAH, District Judge:

This is an appeal taken by the Commissioner of Internal Revenue to review a decision of the Board

of Tax Appeals which held that there was only a deficiency of $95.61 in income tax to be paid by respondent, administrator of the estate of Louise P. V. Whitcomb, deceased, for the fractional last year 1921. The amount of the tax involved was $723.60, of which respondent contested $675.77, which was sustained by the Board, leaving $627.99 now in controversy.

In 1889 A. C. Whitcomb died, leaving a will devising his estate in trust to be paid to his widow, the decedent, one-third of the interest or income for life and the other two-thirds parts to his two children with remainder over. There was a depreciation in the property of the estate and during the taxable fractional year 1921 one-third of this depreciation was $7167.19; however, during that fractional year the trustee under the will paid the decedent her share of the income without making any deduction for depreciation. The trustee divided the income of the estate among the heirs. Thereafter the residue legatees filed a petition in the Probate Court alleging that the payments so made were illegally made and that they should have been reserved for the purpose of taking care of the depreciation and depletion of the property. After a short period of time had elapsed from the time of the filing of the protests and the order of the State Court, an order was entered by the State Court directing that the money so distributed should be returned to the trustee. The beneficiaries who received the money gave their several promissory notes for their respective shares of the money, pay-

able at the death of the daughter of the testator and without interest. When the respondent made an income tax return for this fractional year in the name of decedent he set forth decedent's share of the net income after deducting the depreciation.

The question involved is as to the effect of the will under the circumstances presented with relation to whether the trustee should maintain a depreciation reserve and the amount to be dispersed annually should be the income of the trust computed by taking from the gross income the amount for depreciation of the trust property? Or in another way of stating it—whether the taxable status of the said income be retroactively changed by an order of the State Court in the settlement of the trustee's account some years later requiring the trustee to maintain such reserve, and the same to be deducted from the gross income of the estate.

The will provided, among other things,—

> "7th. I give to my hereinafter named Executor, Jerome Lincoln of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in Trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb one-third part of the interest thereon or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her; one Adolph, born on or about the 23rd day of February, 1880, and the other Charlotte An-

dree, born on or about the 4th day of December, 1882, with the reversion of remainder of the whole three-thirds parts to the descendants 'per stirpes' of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions, named or indicated in Section Six (6) of this will, having reference to said Harvard College."

It contained no directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciations provided for.

Distribution was made under and pursuant to the instrument creating the trust for a period of thirty-eight years, including the tax year involved. That instrument in law and in fact controlled the distribution of the trust income.

In their returns of income the life beneficiaries under the will did not include the amounts paid to them by the trustee representing their proportionate share of the depreciation deducted on the fiduciary return of the trustee. The Commissioner, therefore, increased the income shown on the several returns by the proportionate share of the depreciation and determined the deficiency in tax in question.

The provisions of the statute which are pertinent are Sections 219 (d) of the Revenue Act of 1921; 219 (b) (2) of the Revenue Act of 1924, and 219 (b) (2) of the Revenue Act of 1926.

1921 Act—Section 219 (d):

> "* * * there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

1924 and 1926 Act—Section 219 (b) (2):

> "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not."

It is clear that Congress when enacting the sections referred to intended to tax each year to the beneficiary of any trust the share of the trust income which was distributed to him in that year, and to tax to the trustee in his fiduciary capacity, any income which was not to be distributed.

There being no provision in the deed of trust or the federal or state statutes allowing to be deducted depreciation from the income of the trust estate, and the income in question representing depreciation having been received by the beneficiary, excepting the payment of $10,700 to the trustee by the estate of the respondent's decedent, and the year in which it was made does not appear, the principle then applicable is that where the beneficiaries receive the income, or in case they do not, the trust estate, is taxable upon the full amount of the income actually received during the year without deduction for depreciation sustained by the corpus of the trust. (Codman v. Miles, 28 F. (2) 823 (C. C. A. 4th); Kaufmann v. Commissioner, 44 F. (2) 144 (C. C. A. 3rd); Hubbell v. Burnet, 46 F. (2) 446 (C. C. A. 8th; Codman v. Commissioner, 50 F. (2) 763 (C. C. A. 1st); Roxburghe v. Burnet, 58 F. (2) 693 (App. D. C.); Baltzell v. Mitchell, 3 F. (2) 428 (C. C. A. 1st). The loss then due to depreciation under the record in the present case is borne by remaindermen in determining the tax.

The respondent urges that as the orders of the Probate Court requiring the amounts of the depreciation reserve so paid to respondent's decedent be repaid to the trust estate, they are binding upon the Federal Courts in determining what are proper deductions to be made under the income law. In this connection we must not forget that we are now considering the application of a federal income taxing statute to the objections and rights of parties in a testamentary trust of real property and not the

question of the construction of a state statute or rule of property rights by the highest Court of the state. We have here the consideration of orders of the Probate Court made after hearing objections of the remaindermen to the trustee's account. The account covered the period from 1903 to 1928 and was filed on September 5th, 1928. These orders were made on September 19, 1928, some six years after the taxable year 1921. During the years 1913 to 1926, inclusive, respondent's decedent and her estate received $151,554.63, which under the orders of the Probate Court was repayable to the trustee on account of depreciation reserve, and of this sum a payment of $10,700 was made to the trust by the estate of respondent's decedent. No evidence appears throwing any light upon the year to which this payment is to be attributed. However, no orders of the Probate Court, the effect of which would relate to what are deductions to be allowed under the national income taxing law, are conclusive and binding on the Federal Courts when in considering a revenue act, and the duty of such Courts is to exercise its own independent judgment.

In view of the conclusions thus reached the decision of the Board of Tax Appeals is reversed.

Reversed.

[Endorsed]: Opinion. Filed January 9, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit.

No. 6835.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb,
Respondent.

JUDGMENT.

Upon petition to review an order of the United States Board of Tax Appeals, this cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said Board of Tax Appeals in this cause be, and hereby is reversed.

[Endorsed]: Judgment. Filed and entered January 9, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred sixty-one (161) pages, numbered from and including 1 to and including 161, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the respondent and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 1st day of June, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5664

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

v.

MARGUERITE T. WHITCOMB, by JOHN FREULER, Agent, Appellee

Appeal from the Board of Tax Appeals

(Argued March 13, 1933. Decided May 22, 1933)

G. A. Youngquist, Sewall Key, Wm. Cutler Thompson, C. M. Charest, Dewitt M. Evans, and John D. Foley, all of Washington, D. C., for appellant.

Claude R. Branch, of Boston, Mass., and W. W. Spaulding, of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

OPINION

MARTIN, Chief Justice:

This appeal involves income taxes for the year 1921, and is prosecuted by the Commissioner of Internal Revenue from an order of redetermination of the Board of Tax Appeals.

The controversy relates to the estate of A. C. Whitcomb, deceased, a resident of the State of California, who died in the year 1889, leaving a last will which was admitted to probate by the Superior Court of San Francisco. The decedent left surviving him his widow, Louise P. V. Whitcomb, a daughter, Charlotte A. W. Lepic, and a son, Adolph Whitcomb. The latter died on September 5, 1914, survived by his widow, Marguerite T. Whitcomb, the respondent herein, and his children, Louise A. Whitcomb and Lydia L. Whitcomb.

Item seventh of decedent's will reads as follows:

"7th. I give to my hereinafter named executor, Jerome Lincoln, of said San Francisco, all the rest of my property,

real, personal, or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb, one-third part of the interest thereon or income therefrom for and during her natural life, and the other two-thirds parts to my two children, born of her: One, Adolph, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants 'per stirpes' of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in section six (6) of this will, having reference to said Harvard College."

The will contains no directions as to the manner in which the income from the trust shall be computed, and makes no provision relating to depletion nor a depletion reserve fund.

Since the year 1905 James Otis has served as trustee of the trust thus created. The original trust estate consisted largely of cash, bonds, stocks, and notes. On February 23, 1906, the trust estate consisted of similar securities of a total value of more than $3,000,000, together with certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco earthquake and fire occurred. All of the improvements on the San Francisco real estate owned by the trust were destroyed by the fire. Some time after this the trustee adopted the policy of improving the real estate owned by the trust and of converting the other assets of the estate to accomplish that purpose. As a result of this policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during the years 1921 to 1926, inclusive, consisted almost entirely of improved real estate, including the Whitcomb Hotel and its furniture and equipment. The latter item represented an investment of more than $2,000,000.

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear, and tear, as follows:

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee of the trust filed fiduciary income-tax returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year the respective amounts above set forth, representing exhaustion, wear, and tear sustained by the trust. The trustee, however, did not withhold these amounts or any part of the income of the trust estate from the beneficiaries to whom income payments were due, and each of them received his undiminished share of the income of the trust. From 1903 to 1928 the trustee presented an annual account of his proceedings to the beneficiaries, but did not file any account in the Superior Court of San Francisco, which had jurisdiction over the trust. However, on September 5, 1928, the trustee filed with the court an account covering the period from February 23, 1903, to February 23, 1928, and setting out all of the payments made to the beneficiaries during that period. This was accompanied by a petition for its allowance.

The allowance of the account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rouchechouart, children of Charlotte A. W. Lepic, one of the beneficiaries herein, who are two of the remaindermen entitled to part of the corpus of the trust upon the termination thereof, if they be then living. In their objections, which were filed with the court, they alleged that the trust property had sustained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that such amount of $622,434.11 had been paid by the trustee to the beneficiaries as income of the trust, thus impairing the trust property to that extent, and they prayed that the trustee be charged therewith. All of the parties interested in the trust estate were notified of the filing of the account and of the objections, and were represented by counsel at the hearing held thereon.

On September 19, 1928, the court entered an order in the matter which is in part as follows:

"It is hereby ordered, adjudged, and decreed that the objection of said Napoleon Charles Louis Lepic and Charlotte

de Rochechouart to said account that no reserve or other provisions for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objections, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to wit:

1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

"that James Otis, the said trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said trustee, to the effect that under and by virtue of the terms of said trust it was the duty of said trustee to make such disbursements with such deduction; that said trustee in making said disbursements without such deduction was entitled to rely upon said advice of the said counsel, and that said disbursements were so made by said trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said Charlotte de Rouchechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or does attach to said trustee or to said James Otis by reason of having made such disbursements or any of them without deductions.

"It is further ordered, adjudged, and decreed that the recipients of the income of said trust estate during the

period from February 23, 1913, to February 23, 1927, repay to the said trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said trustee as a reserve for depreciation for each of said years 1913 to 1927, both inclusive.

"It is further ordered, adjudged, and decreed that from and after the year ending February 23, 1927, and until the termination of said trust, the said trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income-tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper."

Thereupon, on January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb, Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart, acting in conformity with the court's order, executed and delivered to the trustee their promissory notes for the amounts by which the distributions made to them exceeded the distribution which would have been made had the trustee retained a reserve for depreciation of the trust property. The notes were to bear no interest and were made payable at the termination of the trust—that is, upon the death of Charlotte A. W. Lepic.

The respondent in her return of income for the year 1921 did not include the full amount paid to her by the trustee, but omitted therefrom her proportionate share of the depreciation deducted on the fiduciary return of the estate. The Commissioner increased the income shown on the return by such proportionate share of the depreciation and determined a deficiency in tax accordingly. The Board of Tax Appeals, six members dissenting, reversed and set aside the determination of the Commissioner, who then appealed for a review by this court.

The question at issue is whether respondent, as life beneficiary under the testamentary trust aforesaid, is entitled to a deduction for depreciation of the corpus of the trust, notwithstanding that she received from the trustee her full

share of the accruing income of the trust undiminished because of depreciation or otherwise. The statute involved reads as follows:

"Revenue Act of 1921, c. 136, 42 Stat. 227

"Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including——

* * * * * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * *

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust."

The present issue may be considered first as the case stands without regard to the decision of the California court. The authorities up to that time were unanimous in support of the proposition that a life beneficiary of a trust estate is taxable upon the full amount of income actually received by or distributable to him during the taxable year,

without deduction for depreciation sustained by the corpus of the trust.

In Baltzell v. Mitchell, 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, it was held that under the Revenue Act of 1918, sec. 219, subd. (d), the life beneficiary of the income of a trust estate is taxable on the income actually received by or distributable to him, without deduction for losses to the capital of the estate incurred during the year. In Abell v. Tait, 30 F. (2d) 54 (C. C. A. 4th), a case presenting similar facts, a similar decision was reached.

In the case of Whitcomb v. Blair, 25 F. (2d) 528, involving the same beneficiary, the same trust, and the same question as is presented in the present case, although for a prior taxable year, we held against the claim of the life beneficiary in the following terms:

"The appellant as life tenant in the trust estate was entitled to receive the full one ninth of the income therefrom, without regard to exhaustion or wear and tear of the corpus of the estate, and this is what appellant actually received from the trustee as her distributive share of the income. The trustee was not entitled to withhold any part of her share of the income of the trust estate in order to make good the exhaustion or wear and tear of the capital assets of the estate; nor did the trustee in fact do so. Capital losses in such cases fall upon the reversioners or remaindermen and not upon the life tenant. Therefore, the payment made by the trustee to appellant was in fact and law the distributive share of the income to which she was entitled as life tenant and consisted in no part of capital depreciation restored to her. It was therefore taxable in her hands. This conclusion is not negatived by the fact that the trustee was entitled to enter deductions for capital losses or gains in his return for the trust estate as a single entity."

In Kaufman v. Commissioner, 44 F. (2d) 144 (C. C. A. 3rd), the foregoing decision was cited with approval and the court declined to sanction a deduction to a life tenant for depreciation of buildings, part of the corpus of the trust. In Hubbell v. Burnet, 46 F. (2d) 446 (C. C. A. 8th), certiorari denied, 283 U. S. 840, the decision in Whitcomb v. Blair, supra, was cited with approval and the court held that although certain amounts of depreciation were actually set aside by the trustee, their retention was unauthorized

and that they were "distributable" and accordingly were subject to tax. In Codman v. Miles, 28 F. (2d) 823 (C. C. A. 4th), certiorari denied, 278 U. S. 654, the court declined to allow a deduction from the amount actually distributed to a life beneficiary on account of the exhaustion of the corpus, pointing out that such a course of action "would invite as well as permit, to an unlimited extent, subterfuges whereby those entitled to large incomes could avoid their just obligations to the Government." In Codman v. Commissioner, 50 F. (2d) 763 (C. C. A. 1st), involving the same trust as in Codman v. Miles, supra, a similar conclusion was reached. In Roxburghe v. Burnet, 61 App. D. C. —, 58 F. (2d) 693, certiorari denied, 286 U. S. 567, and in Mary Roxburghe v. United States, 64 Ct. Cls. 598, both cases relating to the same taxpayer but to different tax years, the taxpayer claimed a deduction of three per cent from income actually received by her from the trustee on account of depreciation of houses composing the trust property, and the claim was denied in both cases.

The question next arises whether the decision of the California court has made this case an exception to that rule. We think it has not. That decision does not rest upon an interpretation of any statute of California, nor can it be said to rest upon an interpretation of the testator's will.

In American Security and Trust Company v. Paine, 33 App. D. C. 178, we held that in construing a will for the purpose of determining whether it is the duty of the trustee thereunder to pay the entire income derived from a trust fund to the life tenant, or to make certain deductions therefrom for the benefit of the remainderman, the question involved is not to be determined by any arbitrary rule, but by ascertaining, if possible, the meaning and intention of the testator from the language employed in the creation of the trust, from the relation of the parties to each other, their condition, and the surrounding facts and circumstances of the case.

It is fair to assume in this case that had the testator intended that the trustee should establish such a reserve fund for depreciation, there would have been apt and effective language in the will to declare that purpose. By the terms of the will the testator undertook to provide for his widow and his two children primarily. They were the principal and immediate objects of his bounty, and it is unrea-

sonable to believe that he intended that the annual payments of income to them should be made dependent upon the vicissitudes attending the corpus of the fund. At the time of the execution of the will the testator's assets consisted almost*ly* entirely of notes, bonds, and other like property. It was not until many years after the death of the testator that the assets were in large part converted into improved real estate and the subject of depreciation became one of present importance.

The trustee continued the control of the trust from 1903 to 1928, making annual accounts with the life beneficiaries of the trust, and it appears that during those years no action was taken to establish a reserve for depreciation; nor did the trustee during all of that period file any account of his proceedings with the probate court having jurisdiction over the trust estate. In the year 1928 for the first time, following shortly after the decision of this court in the case of Whitcomb v. Blair, supra, the trustee filed an account in the probate court, and the court ordered the trustee to establish a reserve fund for depreciation and determined the amount thereof for the years 1913 to 1927. The life beneficiaries were ordered to refund that amount to the trustee. They did this by executing promissory notes bearing no interest, and payable at the termination of the trust.

It is claimed in effect that this record conclusively establishes the right of the life beneficiaries to deduct from their income-tax returns for the years 1921 to 1926, inclusive, the amounts found to be due in those years to the trustee for the reserve fund for depreciation.

We are of the opinion, however, that the order of the probate court made in the settlement of the trustee's account is not sufficient authority to overcome the general rule theretofore established under the Federal income-tax law. There are many decisions showing the mutual respect exhibited by the Federal and State courts in dealing with one another's decisions. It seems needless in this case to enter into a discussion of them, for in our opinion the bare statement of the facts in this case shows that we may without disrespect to the California probate court follow the ruling which this court, respecting this identical trust, reported prior to the decision of that court, and which has since been approved and adopted by the other Federal courts above named.

In Ford v. Commissioner, 51 F. (2d) 206 (C. C. A. 6th), certiorari denied, 284 U. S. 666, it appeared that the executors of an estate which consisted mostly of stocks made a partial distribution in 1920 of the stocks and the legatees received the dividends therefrom in 1922. The probate court in 1926 held the distribution to be premature and ordered the legatees to account for the principal and income of the stocks from the date of distribution up to December 31, 1922. The matter was handled entirely by book entries. The court in passing upon the matter said, in part:

"We think these 1922 dividends were taxable income received by the petitioners during that year. Certainly they then had complete legal title to the stock and to the dividends. If taxes regularly assessed could be invalidated, an indefinite number of years later, by a consent judgment purporting to vacate the title of the taxpayer to the fund he had reported as income, the necessary system of tax collection would be much impaired. The true normal criterion to be applied in this class of case is the actual receipt and retention during the year in question of what was then considered to be income, not whether the taxpayer exposed himself to possible personal liability."

In Fidelity and Columbia Trust Company v. Lucas, 52 F. (2d) 298, the court said:

"Furthermore, it is well settled that a decision of a State court, establishing a local rule of property or construing a State statute or a contract made after the rights of a litigant in a Federal court suit had accrued, and in a case to which he was not a party, is not binding upon the Federal court."

See also Kuhn v. Fairmont Coal Company, 215 U. S. 349.

Our conclusion herein follows the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Commissioner v. Freuler, decided January 9, 1933, which related to the identical issue now before us. In respect to the decision of the California court, it says:

"The respondent urges that as the orders of the probate court requiring the amounts of the depreciation reserve so paid to respondent's decedent be repaid to the trust estate,

they are binding upon the Federal courts in determining what are proper deductions to be made under the income law. In this connection we must not forget that we are now considering the application of a Federal income taxing statute to the objections and rights of parties in a testamentary trust of real property and not the question of the construction of a State statute or rule of property rights by the highest court of the State. We have here the consideration of orders of the probate court made after hearing objections of the remaindermen to the trustee's account. The account covered the period from 1903 to 1928 and was filed on September 5, 1928. These orders were made on September 19, 1928, some six years after the taxable year 1921. * * * However, no orders of the probate court, the effect of which would relate to what are deductions to be allowed under the national income taxing law, are conclusive and binding on the Federal courts when in considering a revenue act, and the duty of such courts is to exercise its own independent judgment."

In our opinion, therefore, the decision of the Board of Tax Appeals was erroneous; it is reversed and the cause is remanded for further proceedings not inconsistent herewith.

DISSENTING OPINION

GRONER, J., dissenting:

I am unable to agree, and I shall state the reasons of my dissent briefly.

The question at issue is controlled by the provisions of section 219 of the Revenue Act of 1921. Subdivision (d) of that section imposes a tax on the net income of each beneficiary of an estate or trust received in the taxable year "which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not * * *."

Fairly construed, I think it cannot be doubted that the true test of liability depends upon whether the income is distributable. If it is, it is taxable whether received or not. If it is not, it would seem to me to follow that it is nontaxable, even though received, as, for instance, by mistake. If I have correctly stated the rule, then it follows

that in this case the decision would turn on the question whether the income sought to be taxed was properly distributable to the taxpayer.

In Whitcomb v. Blair, referred to in the opinion of the court, there was agreement between both parties that the taxpayer was entitled to the sums received and taxed, and on that basis we held the taxpayer was "in fact and in law" entitled to receive the income which was taxed. After our decision, two of the remaindermen filed timely objections to the trustee's account. The Superior Court of California having jurisdiction of the trust, all parties in interest being then before the court, entered a decree charging the beneficiaries, including taxpayer, in the amount of $622,000 on the ground that that amount, representing depreciation for the years 1913 to 1927, had been unlawfully paid to them by the trustee, and also directing the trustee to withhold annually thereafter for depreciation a reasonable and proper amount from the income of the trust property. One of the beneficiaries paid in cash his share of the amount required to be returned to the trustee, but the others, including taxpayer, gave the trustee their notes bearing interest and payable at the termination of the trust. The acceptance of the notes was apparently with the consent of the remaindermen.

The case, therefore, is one in which a State court having jurisdiction of the estate and of the parties has decreed that the taxpayer was not entitled to certain portions of the income received by her over a period of years, including the year involved here, and that the sum so improperly received should be returned to the trustee, and the court's order has been obeyed. If, therefore, the statute taxes only the income properly received, and if the final decree of the State court is in accordance with the California law, as I think it is, and is therefore conclusive and binding, as it seems to me it is (Keith v. Johnson, 271 U. S. 1-8), it would follow necessarily that the final decree of that court forecloses the question.

In this aspect there remains only the question whether the decree of the State court was obtained in a collusive suit. There is nothing in the record to sustain a contention of that sort.

I think, therefore, the decision of the Board of Tax Appeals should be affirmed.

A true copy. Teste:

—— ——, Clerk Court of Appeals, D. C.

IN SUPREME COURT OF THE UNITED STATES

Nos. 129, 130, 131

ORDER EXTENDING THE TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI—Filed March 16, 1933

On consideration of the motion of counsel for petitioner in the three above entitled cases, and good cause therefor having been shown, it is now here ordered that the time within which petition fof writs of certiorari may be filed herein be, and the same is hereby extended for a period of 60 days from April 9, 1933.

Dated this 16th day of March, 1933.

Geo. Sutherland, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES

Nos. 129, 130, 131

STIPULATION AS TO CONSOLIDATION, ETC.

It is hereby stipulated as follows:

(1) That while the above entitled proceedings were initiated before the United States Board of Tax Appeals by three separate appeals from a series of deficiency notices, the same were consolidated for hearing before the Board and only a single finding of fact and opinion were rendered upon which separate orders of redetermination were entered for the respective years involved.

(2) That on an appeal from the final decisions of the Board to the United States Circuit Court of Appeals for the Ninth Circuit, it was stipulated between the parties that because of the identity of the facts, parties and issues

for all of the years and in each of the different proceedings; that only one record be printed and briefs filed in cause No. 6835, and

(3) That the judgment of the United States Circuit Court of Appeals in cause No. 6835 be treated and considered as its judgment in causes Nos. 6833 and 6834.

Now, therefore, it is agreed between the parties that on application for writs of certiorari in the Supreme Court of the United States, the consolidated manner in which the cases were considered below may be continued; and in support of the consolidated petition for the issuance of writs of certiorari only the printed record below in cause No. 6835 may be filed, together with one supporting brief in consolidated form.

The judgment of the Court entered in cause No. 6835 below, under the docket number assigned to it in the Supreme Court, may be treated as the judgment of the Court in causes Nos. 6833 and 6834 below, under the docket numbers assigned to said causes in the Supreme Court under the consolidated proceedings entitled above.

The object of this stipulation is to simplify and save costs of printing records in each cause which would be only a duplication, if done.

Dated at Washington, D. C., this the 6th day of June, 1933.

W. W. Spalding, Attorney for Petitioners. J. Crawford Biggs, Solicitor General, Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 129

ORDER ALLOWING CERTIORARI—Filed October 9, 1933.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 129, No. 130, No. 131, No. 139, No. 140, No. 141, No. 142, No. 143, No. 144, No. 145, No. 146, No. 147, No. 148, No. 149, No. 150

STIPULATION AS TO RECORDS, ETC.—Filed Nov. 15, 1933

Subject to the approval of the Court, it is hereby stipulated between counsel in the above cases as follows:

1. Only cases numbered 129 and 145 are to be argued. These are to be argued as two separate cases.

2. The decision in No. 129 shall control the decision in Nos. 130 and 131 (Nos. 6833 and 6834 in the Circuit Court of Appeals for the Ninth Circuit) and Nos. 139-144, inclusive (Nos. 5664, 5667, 5669, 5671, 5672 and 5674 in the Court of Appeals of the District of Columbia). If judgment shall be rendered for the petitioner in No. 129, the judgments of the courts below shall be reversed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the respondent in No. 129, the judgments of the courts below shall be affirmed in each of the cases mentioned in this paragraph.

3. The decision in No. 145 shall control the decision in Nos. 146-150, inclusive (Nos. 5666, 5668, 5670, 5673 and 5675 in the Court of Appeals of the District of Columbia). If judgment shall be rendered for the petitioner in No. 145, the judgments of the Court of Appeals of the District of Columbia shall be reversed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the respondent in No. 145, the judgments of the Court of Appeals of the District of Columbia shall be affirmed in each of the cases mentioned in this paragraph.

4. In preparing the record to be used in this Court in connection with the argument in No. 129, the Clerk shall include the following matters:

The record as filed with the petition for certiorari.

The opinion of the Court of Appeals of the District of Columbia in No. 139 (No. 5664 in the Court of Appeals of the District of Columbia).

The stipulation presented in connection with the petition for certiorari.

The order granting certiorari.
This stipulation.

5. In preparing the record to be used in this Court in connection with the argument in No. 145, the Clerk shall include only the following matters:

Docket entries, pp. 1-2.
Decision of the Board of Tax Appeals, pp. 24-25.
Petition for review filed in the Court of Appeals of the District of Columbia, pp. 25-27.
Orders enlarging time, pp. 65-66.
Opinions and judgments of the Court of Appeals of the District of Columbia in Nos. 139 and 145 (Nos. 5664 and 5665 in the Court of Appeals).
The order granting certiorari.
This stipulation.

The Clerk shall also include references only to the various proceedings which appear on pp. 2-24 and 28-64 in the record in No. 129.

6. This stipulation is entered into solely for the purpose of reducing the amount of printing required for the record in these cases. The parties stipulate that either shall have the right to refer in his briefs and oral arguments to any portions of the records in these causes as filed in this Court on petition for certiorari which are not contained in the record as printed pursuant to this stipulation.

Dated at Washington, D. C., this 14 day of November, 1933.

Claude R. Branch, Robert A. Littleton, Attorneys for the Petitioners. J. Crawford Riggs, Solicitor General.

FILE COPY

FILED
JUN 6 1933
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

Nos. 129, 130, & 131

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

(CCA 68

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

(CCA 68

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

(CCA 6

PETITION FOR WRITS OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

CLAUDE R. BRANCH,
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,
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JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRITS OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, pray that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Ninth Circuit entered on January 9, 1933, in the three cases between the above named parties, docketed therein as Nos. 6833, 6834 and 6835.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 32) is reported in 22 B. T. A. 118. The opinion of the Circuit Court of Appeals (R. 154-160) is reported in 62 F. (2d) 733.

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered January 9, 1933. By order of Mr. Justice Sutherland, dated March 16, 1933, the time for filing of these petitions has been extended to June 8, 1933.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

These cases involve the question whether certain amounts which the petitioner and his decedent received in the years 1921-1925, inclusive, were income taxable to

them in those years under Section 219 of the Revenue Act of 1921, and Section 219 of the Act of 1924. The amounts in question were actually paid by the trustee of a testamentary trust to the taxpayers, beneficiaries of the trust, as income. Thereafter the state court having jurisdiction over the accounts of the trustee held that the amounts in question should not have been paid to the taxpayers but should have been retained by the trustee as a reserve for depreciation of certain property which produced the revenue. The state court decreed that the petitioner repay the amounts in question.

There are two questions presented, one involving the construction of the statutes and the other involving the effect to be given by the federal courts to the decree of the state court.

STATUTES INVOLVED.

The statutes involved are Section 219 of the Revenue Act of 1921 and Section 219 of the Revenue Act of 1924. All pertinent provisions of these sections are printed in the appendix, pages i to viii, *infra*. The most important provision of the 1921 Act is that

> "there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, *is distributable to such beneficiary, whether distributed or not.*"

STATEMENT.

The above petitions involve income taxes asserted against the administrator of the estate of Mrs. Whitcomb for that part of the year 1921 in which she was alive and also for the rest of 1921, for 1922, 1923, 1924 and 1925. There is, however, no substantial difference in the facts as to the different years. After her death, her estate received part of the income from the trust. The following epitome of the facts in the case in which the court below handed down the opinion (involving the part of the taxable year 1921 when Mrs. Whitcomb was alive) indicates substantially the situation in each of the cases. The facts therein set forth appear in the unchallenged findings of the Board of Tax Appeals or in uncontradicted evidence.

A. C. Whitcomb died domiciled in California in 1889 (R. 34). By his will, which was duly probated there, he left the residue of his estate in trust to pay his widow, the decedent, one-third of the interest or income for life, and to pay the rest of the income to other persons, with remainder over (R. 34-35). The residue consisted largely of cash, bonds, stocks and notes and of some improved real estate (R. 35). In 1906 the San Francisco fire destroyed the improvements on certain of the real estate (R. 35-36). The trustee then adopted a policy of building very substantial improvements, acquiring additional real estate and selling other assets of the trust to raise cash for this end (R. 36). He erected minor improvements in 1906, major improvements from 1910 to 1913, including the Whitcomb Hotel, and later other improvements (R. 70-72). A substantial part of the principal of the trust estate was invested in furniture for the hotel (R. 36).

The Whitcomb Hotel and its furniture and equipment alone represented an investment of more than two million dollars (R. 36). During each of the taxable years here involved, the improvements and furniture suffered substantial exhaustion, wear and tear (R. 36). The exact amount of the depreciation for each year was specifically found by the Board. During 1921 alone the depreciation was in excess of $43,000 (R. 36).

The trustee, however, did not withhold from the beneficiaries to whom payments of income were being made anything on account of this depreciation (R. 37-38). The will contained no express directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciation provided for (R. 35).

The trustee, in his fiduciary return for the year 1921 (as well as other years), in computing the net income of the trust, deducted the amount of depreciation sustained by the trust estate; and neither the petitioner nor any other beneficiary included in his or her return of income for 1921 (or the other years), the amount paid by the trustee representing his or her share of the amount deducted on the fiduciary return for depreciation (R. 37, 42).

Later the trustee filed his account with the California state court having jurisdiction over the trust estate and his accounts (R. 38). Remaindermen objected because of the absence of a depreciation reserve (R. 38-39). After a hearing, in which all parties were represented by counsel, the court sustained the objection (R. 39-40) and ordered restoration of such a reserve (R. 41). Petitioner repaid $10,700 (R. 42), which is more than decedent's share of the depreciation for the fractional year 1921 in

question (*supra*, p. 5) (R. 36-37). The excess was due to the fact that the amount of the repayment covered more than this period.

The state court also decreed that thereafter until termination of the trust the trustee should withhold annually as a reserve for depreciation, a reasonable and proper amount from the income of the trust property (R. 41).

The Commissioner of Internal Revenue increased the income shown on the taxpayer's returns by his respective proportionate share of the amount allocated to depreciation, and on that basis asserted deficiencies in his tax (R. 42). The Board of Tax Appeals held that the petitioner was correct in contending that he was not taxable upon the amounts representing depreciation which he and his decedent received and which he had been ordered to return (R. 42-49).

The Commissioner filed a petition for review in the Circuit Court of Appeals, contending in effect that the Board erred in holding that the distributions made by the trustee to the taxpayers were not taxable income in their entirety to the taxpayers (R. 55-59).

That court sustained the contention of the Commissioner, holding that by Section 219 Congress "intended to tax each year to the beneficiary of any trust the share of the trust income which *was distributed* to him in that year," in spite of the fact that what the statute provided the beneficiary should include in his return was "that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is *distributable* to such beneficiary, *whether distributed or not.*" The court also held that the order of the state court was not conclusive upon it in con-

sidering a revenue act, and held that the loss due to depreciation "is borne by remaindermen in determining the tax."

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In holding that the taxpayer is taxable upon the amounts received by him and his decedent from the trustee which were not properly distributable to them.

(2) In holding that the order of the state court was not conclusive on the question as to what amounts were properly distributable to the beneficiaries of the trust.

(3) In holding that the trustee was not obliged to withhold from distribution a reasonable allowance for depreciation of the improvements and hotel furniture.

(4) In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRITS.

(1) The construction of Section 219 of the Revenue Act adopted by the Circuit Court of Appeals is, we submit, not justified by the language of the statute. As Judge Groner said of this statute in his dissenting opinion in *Burnet v. Whitcomb* (decided by the Court of Appeals of the District of Columbia, May 22, 1933):*

> "Fairly construed, I think it cannot be doubted that the true test of liability depends upon whether the income is distributable. If it is, it is taxable whether received or not. If it is not, it would seem

*In this case the majority of the court sustained the contentions of the Commissioner in the case of another beneficiary under the trust here involved.

to me to follow that it is nontaxable, even though received, as, for instance, by mistake."

The majority of the Court of Appeals of the District of Columbia does not definitely decide this point in favor of the present contention of the Commissioner. That opinion relies upon a number of other cases also cited by the Circuit Court of Appeals in another connection which justify an inference contrary to the ruling of the Circuit Court of Appeals on this point. Some of these cases are:

Whitcomb v. Blair, 25 F. (2d) 528, 58 App. D. C. 104;

Hubbell v. Burnet, 46 F. (2d) 446 (C. C. A. 8th), certiorari denied 283 U. S. 840;

Baltzell v. Mitchell, 3 F. (2d) 428 (C. C. A. 1st), certiorari denied 268 U. S. 690.

See also:

Roxburghe v. Burnet, 58 F. (2d) 693 (App. D. C.).

Those cases, either finding or assuming that certain income was distributable, held that it was taxable. They certainly sustain Judge Groner's conclusion from them that, "If it is, it is taxable whether received or not." They seem to compel his final conclusion that, in the converse case, "If it is not * * * it is nontaxable, even though received, as, for instance, by mistake."

Moreover, the construction adopted by the court below is contrary to that which has been placed upon this section for many years by the Treasury Department. As far as we can ascertain, never, until the instant cases (and their companion cases) were argued, did the Commissioner contend that Section 219 of the 1921 Act or similar pro-

visions of previous or later acts should be construed as imposing upon beneficiaries of a trust a tax on money improperly distributed to them.

Each of the Revenue Acts of 1926, 1928 and 1932* contains provisions substantially the same as those of Section 219 of the Act of 1924, and the question here involved is consequently one which arises under the current act as well as under the Act of 1918 and all acts subsequent thereto. Since the Commissioner has changed his previous attitude and the court below has accepted his new view, the question is one which will undoubtedly arise frequently in the future. To our knowledge there are now pending cases involving this very question which will go to the Circuit Court of Appeals for the Eighth Circuit and to the Court of Appeals of the District of Columbia.

The question is consequently an important one in the administration of the Revenue Acts, and we submit that it should be decided authoritatively by this court at this time.

(2) The decision of the Circuit Court of Appeals in the instant case that the order of the state court is not controlling is directly in conflict with the holding of this court in *Uterhart v. United States,* 240 U. S. 598, 603, and the holding of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Field,* 42 F. (2d) 820, 822. It also disregards the provisions of R. S. Section 905, which provides that the records and proceedings of state courts if properly authenticated "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

*Section 219 of the Act of 1926, Sections 161-162 of the Act of 1928, and Sections 161 and 162 of the Act of 1932.

(3) The court below, in holding that the trustee should not have maintained a reserve for depreciation, has decided an important question of local law in a way in conflict with the applicable local decisions—*In re Gartenlaub,* 185 Cal. 648, and the decision of the state court in the case of this very trust. Or if the question decided should be considered one of general law, it has been decided in a way probably untenable and in conflict with the weight of authority. (For some of the authorities, see pp. 19-20 *infra.*)

Wherefore it is respectfully submitted that the petition should be granted.

Dated, San Francisco, California,
June 2, 1933.

CLAUDE R. BRANCH,
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FELIX T. SMITH,
Attorneys for Petitioner.

CHOATE, HALL & STEWART,
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PILLSBURY, MADISON & SUTRO,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

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DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

For statement of the case and also statements as to the opinions below, jurisdiction, questions presented, statutes involved and specification of errors, we refer to the foregoing petition.

ARGUMENT.

Although the opinion of the court is in places far from clear, its conclusion must be rested upon one of two propositions which it appears to lay down, both of which we submit are unsound: (1) that the statute must be construed to tax all amounts paid by a trustee to a beneficiary of a testamentary trust as income, even amounts improperly distributed, or (2) that the decree of the state court having jurisdiction over the accounts of the trustee is not controlling here. If it is sought to justify the result on the second of these grounds, the court's conclusion can be sustained only by the establishment of another proposition, which we believe is also unsound—that under the California law the trustee was not required to set up a reserve for depreciation. We will discuss each of these questions briefly.

I.

TAXPAYERS WHO ARE BENEFICIARIES UNDER A TESTAMENTARY TRUST ARE TAXABLE ONLY FOR SO MUCH OF THE AMOUNT RECEIVED BY THEM FROM THE TRUSTEE AS WAS PROPERLY DISTRIBUTABLE TO THEM.

Section 219 of the Revenue Act of 1921 imposes a tax, *inter alia*, upon "income received by estates of deceased persons during the period of administration or settlement of the estate" and "income which is to be distributed to the beneficiaries periodically." Executors, in determining the net income of estates during the period of administration, are allowed to deduct "the amount of any income properly paid or credited to any legatee, heir or other beneficiary." Subdivision (d) of

this section also contains the following provision, which is applicable to both classes of income above mentioned:

> "The tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not."

The language above quoted, as well as other parts of this section, indicates clearly that the test of taxability to beneficiaries of income of both of the sorts mentioned is *not actual receipt of money by them, but their legal right to receive the money.* They are taxable only as to income to which they are lawfully entitled.

Section 219 of the previous act—that of 1918—contained similar language. The regulations, which were in force under the 1918 Act at the time when the 1921 Act was passed, provided that each such beneficiary (whether the beneficiary of a trust in which there was income distributable periodically or a legatee of an estate before final settlement to whom income was properly paid) should include in his return "*his distributive share* of the net income, even though not yet paid him, but if the taxable year on the basis of which he makes his returns fails to coincide with the annual accounting period of the estate or trust, then he need only include in his return his distributive share for such accounting period ending within his taxable year."[1] The language of the regulations thus indicated clearly (as indeed the language of the 1918 Act required) that the test of tax-

1. Regulations 45, Article 345, promulgated April 17, 1919.

ability of income was the same for legatees receiving income in the course of the settlement of an estate and for beneficiaries of a trust, the income of which was to be distributed regularly. With this construction in force, Congress passed Section 219 of the 1921 Act, which shows that it approved this construction of the Department. Regulations issued under the 1921 Act[2] were, as to this matter, practically identical with the regulations under the 1918 Act. In Section 219 of the Act of 1924 and in all later acts, Congress reenacted substantially the same language.

Moreover, in Law Opinion No. 1013, promulgated in 1920 (2 C. B. 181, 183), the Solicitor of Internal Revenue, discussing Section 219 of the Act of 1918 relating to the income from trusts, said:

> "It would be highly inequitable and unjust to tax the present beneficiary upon income which is not distributable to him and to which he is not beneficially entitled."

It is, of course, well settled that great weight will be attached to the long adopted construction of tax statutes by the Department of the Treasury. This court has said that a construction "ought not to be disturbed now unless it be plainly wrong."[3]

And where, as here, Congress in subsequent acts has reenacted substantially the same language, that operates as legislative approval of the construction adopted by the Treasury Department.[4]

---

2. See Regulations 62, Article 345, 347, pp. vii-viii, *infra*.
3. *Universal Battery Co. v. United States*, 281 U. S. 580, 583.
4. *Brewster v. Gage*, 280 U. S. 327, 336; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492-493.

In cases arising under Sections 219 of the various acts, the Commissioner previously took the view that in order to impose a tax on income received by a beneficiary it was necessary to show that he was lawfully entitled to the money. See, for example, *Whitcomb v. Blair,* 58 App. D. C. 104.

As far as we are able to ascertain, it was not until the instant cases were argued that the Commissioner advanced the contention that the statute should be construed to tax a beneficiary of a trust on money paid to him through a mistake of law.

This construction now suggested by the Commissioner would produce most unfair results. The Act of 1921 (like the other Revenue Acts) contains no provision entitling a beneficiary to a deduction if in a later year he repays an amount improperly distributed to him. And in the only case which appears to have arisen involving this exact point, the Commissioner argued and the Board of Tax Appeals held (correctly we submit) that the beneficiary was not entitled to any deduction in the later year in which the amount was repaid.

Pyle v. Commissioner, 16 B. T. A. 218.

The rule, moreover, enforces double taxation in cases like the instant case, thus violating the fundamental principle of our tax system. In the instant case the trustee distributed more than was distributable. According to the rule, as announced, the trustee in such cases is taxable upon the net income, less the amount *distributable,* while the beneficiary is taxed upon the amount *distributed.* The excess of the distribution over the amount distributable is taxed twice, once in the hands of the trustee, who is only allowed to deduct what is *distribu-*

table, and again in the hands of the beneficiary, who is taxed upon everything *distributed.* This is contrary to what has been the uniform ruling under our income tax laws that when income was taxable to the trustee, the beneficiary later receiving the income paid no tax (T. D. 1906; Regulations 33, Article 75, T. D. 1944; Regulations 33, Article 29, revised January 2, 1918).

Such a rule is contrary to numerous decisions of the Board of Tax Appeals, in some of which the Commissioner has acquiesced.[5]

None of the cases cited by the Commissioner in the companion cases to the Court of Appeals for the District of Columbia, in support of his contention that the mere receipt of income by a beneficiary is sufficient to render it taxable, such as *North American Oil Consolidated v. Burnet,* 286 U. S. 417, involved Section 219 of the statute or any section having similar language, or throw any light upon the construction to be given to Section 219. In the *North American Consolidated* case, the Court pointed out that under the provisions of the sections there involved the taxpayer would be allowed a deduction for amounts repaid in a later year, a situation which, as we have pointed out, does not exist in the case of the taxpayer here.

Moreover, we submit that Section 219 of the 1921 Act makes the test of taxability whether the amounts were distributable under the order of the court, where, as here, there was an order of court governing the matter.

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5. *Pyle v. Commissioner,* 16 B. T. A. 218; *White v. Commissioner,* 25 B. T. A. 243; *McCrory v. Commissioner,* 25 B. T. A. 994; *Dixon v. Commissioner,* 25 B. T. A. 1164; *Newbury v. Commissioner,* 26 B. T. A. 101, acquiescence by Commissioner XI I. R. B. No. 32, p. 1; *Boston Safe Deposit and Trust Company v. Commissioner,* 26 B. T. A. 486; *Yukon Alaska Trust v. Commissioner,* 26 B. T. A. 635, acquiescence by Commissioner XI I. R. B. No. 39, p. 1.

II.

THE DECISION OF THE STATE COURT WAS CONTROLLING.

The rights of the parties under the will of A. C. Whitcomb are regulated by the state law,[6] and as this court said in *Uterhart v. United States,* 240 U. S. 598, 603:

> "it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."[7]

Although it is true that the federal courts are not bound in all cases to follow the construction of a will adopted by a state court, they cannot disregard a decision of a state court under which property rights have been settled, where, as here, the question is simply what the property rights are.[8]

This, indeed, is required by R. S. 905.[9]

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6. "The state law creates legal interests but the federal statute determines when and how they shall be taxed." *Burnet v. Harmel,* 287 U. S. 103, 110.

7. *Roberts v. Lewis,* 153 U. S. 367; *Keith v. Johnson,* 271 U. S. 1, 8; *Messenger v. Anderson,* 225 U. S. 436. See, also, *United States v. Kombst,* 286 U. S. 424, 426; *Michigan v. Michigan Trust Co.,* 286 U. S. 334, 342.

8. *Commissioner v. Field,* 42 F. (2d) 820, 822 (C. C. A 2d); *McCaughn v. Girard Trust Company,* 19 F. (2d) 218 (C. C. A. 3rd); *Boal v. Metropolitan Museum of Art,* 19 F. (2d) 454 (C. C. A. 2d), certiorari denied 275 U. S. 565; *Atwood v. Rhode Island Hospital Trust Company,* 34 F. (2d) 18 (C. C. A. 1st), certiorari denied 280 U. S. 600; *Hidden v. Durey,* 34 F. (2d) 174, 178; *Appeal of Appell,* 10 B. T. A. 1225, 1231. See, also, *Wells v. Commissioner,* 63 F. (2d) 425, 438.

9. This section is copied on page i, *infra.*
As said in *Hieston v. National City Bank,* 280 Fed. 525, 526 (App. D. C.):
> "The obligation to accord full faith and credit to a valid judgment, other than for lack of jurisdiction of the person or subject-matter, or for the enforcement of a penalty, is without limitation."
See, to the same effect:
Bradford Elec. Co. v. Clapper, 286 U. S. 145, 155; *Hartford Life Insurance Co. v. Barber,* 245 U. S. 146; *Tilt v. Kelsey,* 207 U. S. 43; *Mitchell v. First National Bank,* 180 U. S. 471.

The argument of respondent that the decision of the state court should be disregarded, because it was not made until after the end of the taxable year here involved, is untenable.[10]

At the time when the Revenue Act of 1921 was passed (it was approved on November 23, 1921), the Commissioner took the position that the decision of local courts as to the distribution of income should control. Law Opinion of the Solicitor of Internal Revenue, No. 1013, promulgated in 1920 (2 C. B. 181, 183), discussing Section 219 of the Act of 1918, relating to the income from trusts, stated that the federal statutes and not the rule of the probate court must govern the question as to what constitutes income, but went on to say:

> "The decisions of the local courts, however, as to the distribution of such items of income are important. *They determine by whom the income should be accounted for.*"

We submit that the statement from the Solicitor's opinion, quoted above, is correct. In any event, it expressed the attitude of the Department when the Revenue Act of 1921 was passed, and the Act of 1921 contains no language indicating that Congress intended to adopt the contrary rule, which the Commissioner seeks to apply in the instant case. Consequently, Congress must be deemed to have approved this construction.[11]

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10. Such was, indeed, the case in the following cases:
United States v. Kombst, 286 U. S. 424, 426; *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 342; *Keith v. Johnson*, 271 U. S. 1, 8; *Messenger v. Anderson*, 225 U. S. 436; *Roberts v. Lewis*, 153 U. S. 367; *Atwood v. Rhode Island Hospital Trust Company*, 34 F. (2d) 18 (C. C. A. 1st), certiorari denied 280 U. S. 600; *Hidden v. Durey*, 34 F. (2d) 174, 178; *Boal v. Metropolitan Museum of Art*, 19 F. (2d) 454 (C. C. A. 2d), certiorari denied 275 U. S. 565; *McCaughn v. Girard Trust Company*, 19 F. (2d) 218 (C. C. A. 3rd); *Appeal of Appell*, 10 B. T. A. 1225, 1231.

11. *Brewster v. Gage*, 280 U. S. 327, 336; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492-493.

III.

THE TRUSTEE WAS PROPERLY REQUIRED TO SET UP A RESERVE FOR DEPRECIATION.

Under our view of the case, inasmuch as the state court held that the trustee must set up a reserve for depreciation, it is entirely immaterial whether any other court regards this holding as correct or not. But for the Commissioner to succeed in his view of the case—that the decision of the local court is not binding—it is also necessary for him to establish the further proposition that the decision of the state court was incorrect.

The question, we believe, is a local one. The only applicable local decisions are that of the probate court in the instant case and that of the Supreme Court of the state in *In re Gartenlaub*, 185 Cal. 648. Both support the contention that the depreciation should have been deducted.

Respondent, however, contends that the question is one of general law. Even so, his position is untenable and in conflict with the weight of authorities. Authorities directly supporting the position taken by the probate court in this case are: *Matter of Housman*, 4 Dem. (N. Y.) 404; *Matter of Jones*, 103 N. Y. 621; *In re Crabtree*, 106 Law Times (N. S.) 49; *Hill on Trustees* (Am. ed.), pp. 592, 593. The *Gartenlaub* decision of the California court is in accord with the weight of authority elsewhere.[12]

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12. *Furniss v. Cruikshank*, 230 N. Y. 495; *In re Stevens*, 187 N. Y. 471, 80 N. E. 358, 359-360; *New York Life Insurance & Trust Co. v. Baker*, 165 N. Y. 484, 59 N. E. 257; *In re Murphy's Estate*, 246 N. Y. S. 714; *In re Hall's Estate*, 224 N. Y. S. 376, 381; *In re Golding's Estate*, 216 N. Y. S. 593; *Gould v. Gould*, 213 N. Y. S. 286; *In re Elsner's Will*, 206 N. Y. S. 765; *Kemp v. Macready*, 150 N. Y. S. 618; *Dexter v. Watson*, 106 N. Y. S. 80; *Cairns v. Chaubert*, 9 *Paige's Chancery* 160; *Curtis v. Osborn*, 79 Conn. 555; *New England Trust Company v. Eaton*, 140 Mass. 532; *Healey v. Toppan*, 45 N. H. 243, 266-267; *Ballantine v. Young*,

The particular phraseology of the will in the case at bar emphasizes the pertinency of the foregoing authorities. The testator was dealing with an estate which consisted largely of nondepreciable assets. Naturally he made no specific provision for depreciation. Nevertheless, his gift to the life beneficiaries is only "the interest or income," the remaindermen taking "the whole three thirds parts." This, we submit, must be construed as requiring a reserve to take care of the depreciation on depreciable assets in which the trustee subsequently invested the trust funds.

Dated, San Francisco, California,
June 2, 1933.

Respectfully submitted,
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W. W. SPALDING,
FELIX T. SMITH,
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Of Counsel.

(Appendix Follows.)

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74 N. J. Eq. 572; *In re Wells' Estate*, 156 Wis. 294, 144 N. W. 174; *In re Allis' Estate*, 123 Wis. 223; *Newbury v. Commissioner*, 26 B. T. A. 101, 106-107; *Hill on Trustees* (Am. Ed.), 592-593; *Perry on Trusts and Trustees*, 7th Ed., Vol. II, pars. 548, 548a.

In the court below the respondent conceded that this court, in *New York Life Insurance Company v. Edward*, 271 U. S. 109, had adopted the rule of the *Gartenlaub* decision.

Appendix

FEDERAL STATUTES.

Revised Statutes, Section 905 (U. S. C. Title 28, Sec. 687):

The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. *And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.*

Revenue Act of 1921 (c. 136, 42 Stat. 227, 247):

ESTATES AND TRUSTS.

Sec. 219. (a) That the tax imposed by Sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interest;

(3) Income held for future distribution under the terms of the will or trust; and

(4) *Income which is to be distributed to the beneficiaries periodically,* whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for ~~which~~ he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Section 212, except that (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of Section 214) there shall also be allowed as a deduction, without limitation, any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of Section 214. In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section *the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary,* whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any de-

ceased person during the period of administration or settlement *there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary.* In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under Section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but *there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not,* or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under Section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of Section 216 as are received by the estate or trust.

(e) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall

be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that *there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary.*

[Subdivision (f) of this section has no possible bearing upon the issues in this case.]

Revenue Act of 1924 (c. 234; 43 Stat. 253, 275):

ESTATES AND TRUSTS.

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Section 212, except that

(1) There shall be allowed as a deduction (in lieu of the deduction authorized by paragraph (10) of subdivision (a) of Section 214) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (10) of subdivision (a) of Section 214, or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so

allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

(3) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

(c) For the purpose of the normal tax the estate or trust shall be allowed the same credit as is allowed to a single person under subdivision (c) of Section 216, and, if no part of the income of the estate or trust is included in computing the net income of any legatee, heir, or beneficiary, then in addition the same credits as are allowed by subdivisions (a) and (b) of Section 216.

(d) If any part of the income of an estate or trust is included in computing the net income of any legatee, heir, or beneficiary, such legatee, heir, or beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under Section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of Section 216 as are, under

this section, required to be included in computing his net income. Any remaining portion of such amounts specified in subdivisions (a) and (b) of Section 216 shall, for the purpose of the normal tax, be allowed as credits to the estate or trust.

(e) If the taxable year of a beneficiary is different from that of the estate or trust, the amount which he is required, under paragraph (2) of subdivision (b) of this section, to include in computing his net income, shall be based upon the income of the estate or trust for its taxable year ending within his taxable year.

[Subdivisions (f), (g) and (h) have no possible bearing upon the issues in this case.]

REGULATIONS OF THE TREASURY DEPARTMENT.

Regulations 62 (1922 Edition) promulgated under Revenue Act of 1921 as approved by the Secretary of the Treasury February 15, 1922:

Art. 345. ESTATES AND TRUSTS TAXED TO BENEFICIARIES. —In the case of (a) a trust the income of which is distributable periodically, (b) an ordinary guardianship of a minor, and (c) an estate of a decedent before final settlement as to any income properly paid or credited as such to a beneficiary, the income is taxable directly to the beneficiary or beneficiaries. Each such beneficiary must include in his return *his distributive share* of the net income, even though not yet paid him, but if his taxable year is different from that of the estate or trust, then he need only include in computing his net income his distributive share of the income of the estate or trust for

its taxable year ending within his taxable year. The regulations governing partnerships are generally applicable to such an estate or trust. See articles 331-335.

* * * * * * * * * *

Art. 347. ESTATES AND TRUSTS WITH INCOME WHICH IS DISTRIBUTED PERIODICALLY, AND OTHER INCOME.—In the case of an estate or trust, the income of which consists both of income to be distributed to beneficiaries periodically and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with Section 219 (b) and the tax shall be imposed and paid by the fiduciary in accordance with Section 219 (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in Section 219 (a) (4) which, pursuant to the will or trust deed, is distributable during its taxable year to the beneficiaries. *Each of such beneficiaries shall include, in computing his net income, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to him during the taxable year.*

Due service and receipt of a copy of the within is hereby admitted

this_____day of June, 1933.

_____

Attorney General of the United States,

_____

Assistant Attorney General of the United States,

_____

General Counsel of the Bureau of Internal Revenue,

Attorneys for Respondent.

TABLE OF AUTHORITIES.

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In the Supreme Court
of the
United States

OCTOBER TERM, 1933

No. 129

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF LOUISE P. V. WHITCOMB, *Petitioner,*

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

SUPPLEMENTAL MEMORANDUM

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petition heretofore filed in this case avers that the Circuit Court of Appeals erred *inter alia:*

> In holding that the order of the state court was not conclusive on the question as to what amounts were properly distributable to the beneficiaries of the trust.

And among the reasons assigned for granting the writ is the following:

> The decision of the Circuit Court of Appeals in the instant case that the order of the state court is not controlling is directly in conflict with the holding of this court

in *Uterhart* v. *United States*, 240 U. S. 598, 603, and the holding of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Field*, 42 F. (2d) 820, 822.

The decision of the Circuit Court of Appeals in the instant case that the order of the state court is not controlling is also, we submit, in conflict with the holding of the Circuit Court of Appeals for the Tenth Circuit in *Pitman* v. *Commissioner*, 64 F. (2d) 740, decided April 12, 1933, and reported since the petition in the instant case was prepared.

The *Pitman* case was an appeal from a decision of the Board of Tax Appeals involving federal income taxes. The Commissioner contended before the Board that the taxpayer acquired an undivided one-half interest in certain allotted lands by purchase and the other half by inheritance, and that a certain bonus received on leases of these lands was income taxable to the taxpayer. The Board sustained the contention of the Commissioner. The Circuit Court of Appeals, however, said:

> The county court of Tulsa county by its decree of March 30, 1921, adjudged that the whole of the allotment, both homestead and surplus, descended to the petitioner as the sole heir of Pitman, Jr., deceased. This was in accord with the existing decisions of the Supreme Court of Oklahoma. . . . [Citing certain decisions.]
>
> It is true that in the case of *In re Estate of Robert Pigeon*, 81 Okl. 180, 198 P. 309, decided April 5, 1921, the Supreme Court of Oklahoma overruled [the prior decisions of the Supreme Court of Oklahoma] . . . But the county court of Tulsa county had jurisdiction to enter the decree of heirship and distribution referred to above (sections 1384 to 1394, inc., C. O. S. 1921; Act of June 14, 1918, 40 St. 606, U S C A, Tit. 25, § 375), and such decree has not been appealed from nor in anywise modified.
>
> Proceedings of probate courts are usually in rem. . Free-

man on Judgments (5th Ed.) §1537. A judgment ascertaining and adjudicating heirship and directing the distribution of the estate of a decedent is not a judgment inter partes but a judgment in rem, and is evidence of the facts adjudicated against all the world [citing cases]. . . . It follows that such decree effectually adjudged petitioner to be the sole heir at law of Pitman, Jr., and entitled to inherit the whole of such allotted lands, and that *it is binding on the parties to this proceeding*. We conclude, therefore, that petitioner acquired the whole of the allotted lands by inheritance from Pitman, Jr. [Italics ours.]

The holding of the court as shown by the above extracts is, we submit, directly contrary to that of the Circuit Court of Appeals for the Ninth Circuit in the instant case and also that of the Court of Appeals of the District of Columbia in *Burnet* v. *Whitcomb*, decided on May 22, 1933.

We consequently submit that the conflict established by the *Pitman* case with these decisions is an additional reason for granting the writ in the instant case and in its companion cases—Numbers 130, 131, 139 to 144, and 145 to 150 inclusive, which are all petitions for writs of certiorari now pending in this Court.

The brief of the respondent, after discussing the *Pitman* case and various other cases, asserts (pp. 14–15):

It is believed that the controlling principles have been announced by this Court and for the most part properly applied in the decisions of the lower Federal courts. These principles seem to require the conclusion that a decision of a state court which relates to the effect to be given to a particular will or similar instrument in writing will not be deemed conclusive unless it is required by the application of a state rule of property.

We believe that this is not the proper conclusion in federal tax cases, and that the authorities do not sustain it.

Although some of the cases cited by the respondent hold that the federal courts are not bound in all cases to follow the construction of a will adopted by the state court, the Supreme Court cases cited deal with no federal statute, and do not involve a situation similar to that here involved where the probate court "had the settlement of this estate in its grasp and sole jurisdiction". See *McCaughn* v. *Girard*, 19 F. (2d) 218, 219. Moreover, the latest discussion of any phase of the matter by the Supreme Court—that in *Hawks* v. *Hamill*, 288 U.S. 52—indicates that the doctrine of these cases is extremely limited.

The distinction urged by the respondent is not suggested in *Uterhart* v. *United States*, 240 U. S. 598, or in *Commissioner* v. *Field*, 42 F. (2d) 820 (C. C. A. 2d), or in *McCaughn* v. *Girard Trust Co.*, 19 F. (2d) 218 (C. C. A. 3d), all of which we believe are in conflict with the decision below. The view of the Circuit Court of Appeals for the Second Circuit clearly appears to be contrary to that expressed in the respondent's brief and to that of the court below in the instant case. For in *Farwell* v. *Commissioner*, 38 F. (2d) 791, 795, a Federal estate tax case, it said:

> Because the probate court ratified and approved every payment made by the guardian and no application for re-examination and correction was made within two years, or appeal taken, the decision of that court is final and conclusive. General Laws of Vermont, § 3712. Although the probate court is of limited jurisdiction, its acts, orders, and decrees, within the scope of its jurisdiction are as conclusive as those of any other court. *Sparhawk* v. *Buell's Administrator*, 9 Vt. 41; *Tryon's Administrators* v. *Tryon*, 16 Vt. 313. And the probate court has exclusive jurisdiction of the settlement of accounts of guardians.

Where, as in California, the probate court has exclusive jurisdiction of the settlement of accounts of trustees, its decision must, by like reasoning, be final and conclusive, whether the federal tax involved is an estate or an income tax.

The respondent in his brief in opposition seeks to distinguish certain cases on the ground that in them the decree of the state court in question was entered before the tax year involved, and also relies to some extent upon his inference that the settlement of the trustees' account here was "friendly". We submit that these are not good reasons for opposing our petitions for certiorari. For in *McCaughn* v. *Girard Trust Company*, 19 F. (2d) 218 (C. C. A. 3d), the court held that a decree of a state court was binding on the Government in a federal income tax case, although it was entered by consent long after the taxable year. The following are extracts from the opinion of that court:

> The facts are that John J. Emery, a resident of the state of Maine, died on September 5, 1908, leaving a will in which he directed that the funds involved here should accumulate. While his estate was in the course of administration, the gross income upon this fund was assessed with taxes for the years 1916, 1917 and 1918. Thereafter the question of validity of this accumulation trust was raised in the court of Maine having jurisdiction, with the result that by its decree, ***which was finally entered by consent***, it was adjudged that "the complainants were entitled to the residuary estate absolutely and in fee, free of any trust, as well as the income therefrom with accumulations thereon."
>
> . . . . . .
>
> We are of opinion that the taxation acts as to estates were passed by Congress with appreciation of the fact that, as a practical administrative question, estates would often

be in an undetermined situation incident to subsequent litigation as to rights thereto, and the taxation liability could not in such cases be fairly determined and justly laid until such disputed questions were determined. In the light of this practical consideration, we are of opinion the taxpayer's right and liability depended on facts, and not on appearances; that such facts, though subsequently determined by judicial decree, justly referred back, in this case, for example, to the date of the testator's death, and the rights which then, as found by subsequent decree, really accrued.

The Court of Maine had the settlement of this estate in its grasp and sole jurisdiction. It was for it to determine whether the fund in question was an accumulating trust, held by the Girard Trust Company under a valid trust created by the will, or whether such trust was invalid, and that, consequently, as to this fund the testator died intestate, and that therefore it was in the hands of the Girard Trust Company as executor, and the real owners were the decedent's heirs under the intestate law. Such being the fact, it follows that the income of this fund was not the property of a trust estate accruing under a trust, but was the income payable individually to the several persons who inherited under the intestate laws.

See, in this connection also, *Farwell* v. *Commissioner*, 38 F. 2d) 791 (C. C. A. 2nd), *supra*.

We believe that the decision in the instant case cannot be reconciled with the decisions of the other Circuit Courts of Appeals referred to in this memorandum and in our brief in support of the petition, and the petition should be granted in order that this Court may authoritatively settle the important

questions as to which he decisions of the Circuit Courts of Appeals are in conflict.

Respectfully submitted,

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September, 1933.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 129

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF Louise P. V. Whitcomb, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 42) is reported in 22 B.T.A. 118. The opinion of the Circuit Court of Appeals (R. 154) is reported in 62 F. (2d) 733.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1933 (R. 161). The time within which a petition for certiorari might be filed was extended by a Justice of this Court to June 8, 1933. The petition for writs of certiorari was filed June 6, 1933. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner is administrator of the Estate of Louise P. V. Whitcomb, who died in 1921. The Commissioner of Internal Revenue asserted against him, as her administrator, a deficiency on account of federal tax on her income for the year 1921. This case involves the question whether the amount on account of which the deficiency was asserted was income taxable to her under Section 219 of the Revenue Act of 1921. The amount in question was actually paid in that year by the trustee of a testamentary trust to her, a beneficiary of the trust, as part of her share of the income of the trust. Thereafter the state court having jurisdiction over the accounts of the trustee held that the amount in question should not have been paid to her, but should have been retained by the trustee as a reserve for depreciation of certain property which produced the revenue. The state court decreed that the petitioner repay the amount in question.

(The situation is, of course, the same as if the decedent had lived: no question arises out of the fact that an administrator is involved.)

For a more detailed statement of the facts, see pp. 3-6, *infra*.

STATUTES INVOLVED

The statute involved is Section 219 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 247. This section is copied on pages 39-43 of the appendix. Provisions of earlier and later Revenue Acts re-

lating to the same subject are also printed in the appendix, pages 43-49. The most important provision of the 1921 Act is that

> there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, *is distributable to such beneficiary, whether distributed or not.*[1]

STATEMENT

The following is a summary of the important findings of the Board (R. 34-42), amplified by occasional references to uncontradicted evidence.[2]

A. C. Whitcomb died in 1889, a resident of California. His will, probated in the Superior Court of that state, left the residue of his estate in trust, to pay his widow one-third "of the interest thereon or income therefrom" for her life and the other two-thirds of the income to the testator's children, Adolph and Charlotte, "with the reversion or remainder of the whole three-thirds parts to the descendants 'per stirpes' of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College."

The widow died in 1921, and during 1921 part of

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[1] Throughout this brief, the italics are ours.

[2] Where any evidence is referred to which is not embodied in the findings of the Board, reference is made to the pages of the record on which the evidence appears.

the income was paid to her and part to the petitioner, her administrator.

The residue which passed under the trust originally consisted very largely of cash, bonds, stocks and notes. In 1906 these items had a total value of more than $3,000,000. The trust estate also included certain parcels of real estate, mostly in San Francisco. On April 18, 1906, the San Francisco earthquake and fire destroyed all of the improvements on the San Francisco real estate. Some time after that fire, the trustee adopted the policy of improving the real estate owned by the trust and of converting other assets of the estate to accomplish the purpose. As a result of this policy and of the acquisition of additional parcels of real estate, the assets of the trust estate during 1921 (as well as several years prior thereto and subsequent thereto) consisted almost entirely of improved real estate, including the Whitcomb Hotel and its furniture and equipment, this one building and its contents representing an investment of more than $2,000,000.

During the taxable year here involved, these assets of the trust estate suffered exhaustion, wear and tear. The exact amount of depreciation for each year was specifically found by the Board. During 1921 alone it was slightly in excess of $43,000.

The trustee, however, did not withhold from the beneficiaries to whom payments of income were

being made anything on account of this depreciation. The will contained no express directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciation provided for.

The trustee's account covering the period from February 23, 1903, to February 23, 1928, was filed in the Superior Court of California with a petition for its allowance in 1928. Two of the remaindermen, grandchildren of the testator and children of Charlotte, (who evidently were minors during a large part of the period involved but had then attained their majority)[1] filed certain objections to the account. After notice and a hearing, in which all of the parties in interest, including the petitioner, were represented by counsel, the court disallowed certain of the objections (R. 143-144), but allowed the objection that no reserve or other provision for depreciation for the years 1913 to 1927 had been made, and entered a decree which, as amended, provided that the beneficiaries who had received income should repay to the trust estate an amount in excess of $622,000. on account of depreciation sustained during the years 1913 to 1927 and

[1]The ages of the children of Charlotte do not definitely appear in the record. From the will, however, it does appear that Charlotte was born in 1882 (R. 35). Consequently it seems highly improbable that any child of her could have attained the age of twenty-one until after 1920. That her children who opposed the account were of age in 1928 appears from the fact that an attorney appeared for them and not, as in the case of certain other beneficiaries, for their guardians (R. 129-132, 140-141).

that thereafter until termination of the trust the trustee should withhold annually as a reserve for depreciation a reasonable and proper amount from the income of the trust property.

The petitioner repaid $10,700. in cash.

The trustee, in his fiduciary return for the year 1921 (as well as other years), in computing the net income of the trust, deducted the amount of depreciation sustained by the trust estate; and neither the petitioner nor any other beneficiary included in his or her return of income for these years (or the other years) the amount paid by the trustee representing his or her share of the amount deducted on the fiduciary return for depreciation.

The Commissioner of Internal Revenue increased the income shown on the petitioner's returns for 1921 by his proportionate share of the amount allocated to depreciation, and on that basis asserted deficiencies in the tax of the petitioner for that year.

A majority of the Board of Tax Appeals held that the petitioner was correct in contending that he was not taxable upon the amounts representing depreciation which his intestate received and which he had been ordered to return, and entered an order of redetermination for only certain very small sums, which the petitioner did not contest in the court below and which are not involved here. (R. 54.)

The Commissioner filed a petition for review by

the Circuit Court of Appeals, contending in effect that the Board erred in holding that the distributions made by the trustee to the petitioner's intestate "were not taxable income to her in their entirety." (R. 58.)

That court sustained the contention of the Commissioner, holding that by Section 219 Congress "intended to tax each year to the beneficiary of any trust the share of the trust income which *was distributed* to him in that year," in spite of the fact that what the statute provided the beneficiary should include in his return was "that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is *distributable* to such beneficiary, *whether distributed or not.*" The court also held that the order of the state court was not conclusive upon it in considering a revenue act, and said that the loss due to depreciation "is borne by remaindermen in determining the tax." (R. 158-159.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In holding that the taxpayer is taxable upon the amounts received by him and his decedent from the trustee which were not properly distributable to them.

(2) In holding that the order of the state court was not conclusive on the question as to what amounts were properly distributable to the beneficiaries of the trust.

(3) In holding that the trustee was not obliged to withhold from distribution a reasonable allowance for depreciation of the improvements and hotel furniture.

(4) In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I.

This case concerns the taxability of certain money paid as income to a beneficiary of a trust of which the income was to be distributed to the beneficiaries periodically.

Section 219 of the Revenue Act of 1921 imposes a tax, *inter alia,* upon "income received by estates of deceased persons during the period of administration or settlement of the estate" and "income which is to be distributed to the beneficiaries periodically." Executors, in determining the net income of estates during the period of administration are allowed to deduct "the amount of any income properly paid or credited to any legatee, heir or other beneficiary." Subdivision (d) of this section also contains the following provision, which is applicable to both classes of income above mentioned:

> The tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order

governing the distribution, is distributable to such beneficiary, whether distributed or not.

The language above quoted, as well as other parts of this section, indicates clearly that the test of taxability to beneficiaries of income of both of the sorts mentioned is not actual receipt of money by them, but their legal right to receive the money. They are taxable only as to income to which they are lawfully entitled.

Section 219 of the previous Act—that of 1918—contained similar language. The Regulations which were in force under the 1918 Act at the time when the 1921 Act was passed provided that each such beneficiary (whether the beneficiary of a trust in which there was income distributable periodically or a legatee of an estate before final settlement to whom income was properly paid) should include in his return "his distributive share of the net income even though not yet paid him, but if the taxable year on the basis of which he makes his returns fails to coincide with the annual accounting period of the estate or trust, then he need only include in his return his distributive share for such accounting period ending within his taxable year." The language of the Regulations thus indicated clearly (as indeed the language of the 1918 Act required) that the test of taxability of income was the same for legatees receiving income in the course of the settlement of an estate and for beneficiaries of a trust, the income of which was to be distributed

regularly. With this construction in force, Congress passed Section 219 of the 1921 Act, which shows that it approved this construction of the Department. Regulations issued under the 1921 Act were, as to this matter, practically identical with the Regulations under the 1918 Act.

In many cases arising under Sections 219 of the various Acts, the Commissioner and the courts apparently took the view that in order to impose a tax on income received by a beneficiary it was necessary to show that he was lawfully entitled to the money.

As far as we are able to ascertain, it was not until the instant case and its companion cases were argued that the Commissioner advanced the contention that the statute should be construed to tax a beneficiary of a trust on money paid to him through a mistake of law.

Apparently the only statement of any court which is contrary to our contention is that of the court below in the instant case. The Court of Appeals of the District of Columbia in the companion cases (in which this Court has also granted certiorari) did not so decide. The dissenting opinion of Groner, J., in that court expressly adopted our contention, and the majority opinion contained nothing to the contrary. (R. 63.)

Furthermore, the 1921 statute, as we construe it, requires that, of the income of a trust like this,

the beneficiary is to return that part which is distributable to the beneficiary *"pursuant to the order governing the distribution,"* if there is such an order.

II.

The California Superior Court, having jurisdiction over the trust estate, after hearing the parties, entered an order that the petitioner was not entitled to the amount in question and ordered him to repay it. This decision is controlling.

For if, as we contend, Section 219 should be construed as making the test of taxability whether the amounts received by a beneficiary were distributable to such beneficiary pursuant to the *order* governing the distribution, the order of the California court which had jurisdiction over the trust estate and the parties was just such an order as the statute envisages.

And even if the word "order" in the statute has no application, it is nevertheless true that the state court has settled the property rights of the petitioner as to the amount in question and no decision of any other court can enlarge them.

Under the proper construction of the statute, the only question is what income was distributable, or in other words, what property rights the taxpayer had. That right depends upon and is regulated by the state law, and as this Court said in *Uterhart* v. *United States,* 240 U. S. 598, 603: "It

is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interest taken by the legatees." Although it is true that the federal courts are not bound in all cases to follow the construction of a will adoped by a state court, they cannot disregard the decision of the state court under which property rights have been settled, where, as here, the question is simply what the property rights are. *Farwell* v. *Commissioner,* 38 F. (2d) 791, 795 (C. C.A. 2d); *Commissioner* v. *Field,* 42 F. (2d) 820, 822 (C.C.A. 2d); *McCaughn* v. *Girard Trust Company,* 19 F. (2d) 218 (C.C.A. 3d); *Pitman* v. *Commissioner,* 64 F. (2d) 740 (C.C.A. 10th). See also *Keith* v. *Johnson,* 271 U. S. 1.

The holding of the court below flies in the teeth of Revised Statutes, Section 905, which provides that the records and proceedings of state courts if properly authenticated "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of state from which they are taken."

The argument of the Commissioner that the decision of the state court should be disregarded because it was not made until long after the end of the taxable year here involved is untenable. *McCaughn* v. *Girard Trust Company,* 19 F. (2d) 218, (C.C.A. 3rd).

III.

In any event, apart from the question whether the decision of the state court was conclusive, it is clear that under the state law and on general principles the trustee was obliged to withhold from distribution a reasonable allowance for depreciation of the improvements and hotel furniture. The decision of the Superior Court of California was required by the holding of the highest court of that state in *In re Gartenlaub,* 185 Cal. 648. There is no statute or decision of any California court in conflict with the decision of the Superior Court, and it is in accord with the holdings of the courts in various other states.

ARGUMENT

I.

THE PETITIONER WAS TAXABLE ONLY UPON SO MUCH OF THE AMOUNT PAID BY THE TRUSTEE AS WAS PROPERLY DISTRIBUTABLE

The court below decided against the petitioner on this point. But the Court of Appeals of the District of Columbia in the companion cases did not so decide. Judge Groner, in his dissenting opinion in that court, expressly agreed with our contention, and the majority opinion contained nothing to the contrary. (R. 173.)

The taxability of the amount in question is governed by those provisions of Section 219 of the Revenue Act of 1921 which govern income of trusts which is to be distributed to the beneficiaries periodically. That section, which is the sole section under the part of that act headed "ESTATES AND TRUSTS," lays down comprehensive formulae for determining what income of estates and trusts is to be included in the net income of fiduciaries and what is to be included in the net income of individuals subject to the normal tax and the surtax which are imposed by Sections 210 and 211. Section 219 of the 1921 Act provides in part as follows:[4]

> (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or

[4] The entire section, except subdivision (f), is printed in the appendix, pp. 39-43.

of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(4) *Income which is to be distributed* to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

Subdivision (b) of this section provides that the fiduciary shall make returns of the income and that

> . . . In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of the *income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed* before the close of the taxable year for which the return is made.

Subdivision (c) provides in part that—

> . . . in determining the net income of the estate of any deceased person during the period of administration . . . there may be deducted the amount of any income *properly paid* or credited to any legatee, heir, or other beneficiary.

Subdivision (d) contains the following provision:

> In cases under paragraph (4) of subdivision

(a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary *that part of the income of the estate or trust for its taxable year which pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not,* . . .

Subdivision (e), which applies to cases in which an estate or trust includes both income of the class described in subdivision (a) (4) and other income, contains similar provisions.

In the above, the phrases italicized are manifestly synonymous. They all refer to what ought to be done, rather than to what has been done.

Subdivision (a) (4) is concerned not with the income distributed periodically but that "which *is to be* distributed . . . periodically." Subdivisions (b), (d) and (e) deal not with what is distributed, but with what is "*distributable . . . whether or not distributed.*" Obviously the provisions concerning the income of trusts which is to be distributed to the beneficiaries periodically—in subdivisions (a), (b), (d) and (e)—are based on the same policy as that of subdivision (c) regarding decedents' estates. Indeed, subdivision (d) relates both to beneficiaries of trusts and to legatees of estates,

and that part of its language which is italicized above must have the same meaning for both of these classes of taxpayers. In the case of legatees receiving income from an estate during period of administration, it must mean they are taxable only upon income *properly* paid or credited, as it is only such income which the fiduciary is entitled to deduct in computing net income of the estate which the fiduciary is to pay. Hence, even if there were any doubt as to the meaning of the words which apply solely to beneficiaries of trusts, it would have to be resolved to harmonize with the language of subdivision (c).

The underlying theory is that taxes on income covered by Section 219 are to be determined not by the physical facts concerning the payment of the money, which might be affected by mistakes of the parties, either as to law or fact, or by the desire of the parties so to adjust these matters as to escape income tax, but by the legal rights and duties of the parties. Nowhere is there any indication that consideration is to be given to the actual receipt of money by a beneficiary. The test adopted is the antithesis of this—whether the income is *distributable*. Had Congress intended to include all sums actually distributed as well as those properly distributable (as the Commissioner argued in the court below), it could easily have expressed that idea, and its failure to do so, as well as the use of the expressions italicized above, manifests clearly

the intention to tax the beneficiaries only upon those amounts to which they are rightfully entitled.

It is, of course, well established that the language of a tax statute is not to be extended beyond its clear import, and in case of doubt is to be construed in favor of, rather than against, the taxpayer. *Crooks* v. *Harrelson*, 282 U. S. 55, 61; *United States* v. *Merriam*, 263 U. S. 179, 187-188; *Gould* v. *Gould*, 245 U. S. 151, 153.

Our construction of Section 219 is that which appears always to have been adopted by the regulations of the Treasury Department, and Congress has in various Acts repeated enough of the language of the statute here involved to evidence its approval of this construction.

Section 219 of the Revenue Act of 1918 was similar to Section 219 of the 1921 Act, although not quite so explicit. The provisions from subdivisions (a), (b) and (c) of the 1921 Act quoted above appeared in substantially the same form in the 1918 Act. In the 1918 Act, subdivision (d) of this section provided:

> . . . there shall be included in computing the net income of each beneficiary *his distributive share*, whether distributed or not, of the net income of the estate or trust for the taxable year.

In later Revenue Acts, Congress used similar language. See Section 219 of the Act of 1924, Sec-

tion 219 of the Act of 1926 and also Sections 161-164 of the Act of 1928.[5] All of these also contain substantially the same language as that from Section 219 (c) of the 1921 Act which is quoted above.

Article 345 of Regulations 45, promulgated under the Revenue Act of 1918 on January 28, 1921, provided:

> In the case of (a) a trust the income of which is *distributable* periodically . . . and (c) an estate of a decedent before final settlement as to any income *properly* paid or credited as such to a beneficiary, the income is taxable directly to the beneficiary or beneficiaries. Each such beneficiary must include in his return *his distributive share* of the net income, even though not yet paid him, but if the taxable year on the basis of which he makes his returns fails to coincide with the annual accounting period of the estate or trust, then he need only include in his return his distributive share for such accounting period ending within his taxable year.

Substantially the same language is found in Article 345 of Regulations 62, promulgated under the Revenue Act of 1921 on February 15, 1922. As far as we are able to ascertain, these provisions of these two sets of regulations have never been modified.

Moreover, in Law Opinion No. 1013, promulgated in 1920 (2 C.B. 181, 183), the Solicitor of Internal Revenue, discussing Section 219 of the Act of 1918 relating to the income from trusts, said:

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[5]These are copied in the appendix, pp. 43-48, *infra*.

> it would be highly inequitable and unjust to tax the present beneficiary upon income which is not distributable to him and to which he is not beneficially entitled.

It is, of course, well settled that great weight will be attached to the long adopted construction of tax statutes by the Department of the Treasury. This Court has said that a construction "ought not to be disturbed now unless it be plainly wrong." *Universal Battery Co.* v. *United States,* 281 U.S. 580, 582. And where, as here, Congress in subsequent acts has reenacted substantially the same language, that operates as legislative approval of the construction adopted by the Treasury Department. *Brewster* v. *Gage,* 280 U.S. 327, 336; *McCaughn* v. *Hershey Chocolate Co.,* 283 U.S. 488, 492-493.

As far as we can ascertain, never until the instant case and its companion cases were argued did the Commissioner contend that Section 219 of the 1921 Act or any or the similar provisions of other Acts should be construed as imposing a tax on money improperly distributed.

The Court of Appeals of the District of Columbia in a case involving the tax of another beneficiary under the Whitcomb trust for a previous year under a similar statute, section 219 of the Revenue Act of 1918, *Whitcomb* v. *Blair,* 58 App. D.C. 104, apparently proceeded upon the construction for which we contend. Although that court decided against the taxpayer in that case, its conclusion was

based upon the assumption (then agreed to by both parties) that the taxpayer was entitled to all of the sums which she had received. Thus, that court there said that "the payment made by the trustee to appellant was in fact and law the distributive share of the income *to which she was entitled* as life tenant."

There was no suggestion made in behalf of the Commissioner in *Whitcomb* v. *Blair, supra,* that the amount in question was taxable to the taxpayer merely because she had received it. The Commissioner then evidently felt that his case must be founded upon the proposition that she was rightfully entitled to it, and a considerable part of his brief was directed to the argument of this proposition and to a demonstration that the taxpayer there did not contest that proposition.[6]

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[6]Thus, in his answer filed with the Board of Tax Appeals in that case, he asserted:

> "(1) Under the Revenue Act of 1918 the beneficiary of a trust is required to include in his return and is taxable upon the entire amount of the income of such trust which under the terms of the trust and the laws of the state governing the same is *distributable to such beneficiary* during the taxable year" (R. 16).

Point III of his brief in that case was headed:

> "The 'distributive share' of the appellant in the income of the frust estate, within the meaning of the statute, was the income actually *distributable* to the appellant under the provisions of the will" (p. 13).

His brief asserted that the section there involved:

> "provided in express terms that the income which should be

As far as we can ascertain, there is no authority outside of the decision of the court below supporting its construction of Section 219 of the Revenue Act.

In *Burnet* v. *Whitcomb,* 65 F. (2d) 803 (R.163), a majority of the Court of Appeals of the District of Columbia upheld the Commissioner's determination of deficiencies against another beneficiary under the trust here involved. The majority did not definitely pass upon the question of the construction of the statute, but Judge Groner, in his dissenting opinion, said:

> Fairly construed, I think it cannot be doubted that the true test of liability depends upon whether the income is distributable. If it is, it is taxable whether received or not. If it is not, it would seem to me to follow that it is nontaxable, even though received, as, for instance, by mistake.

The opinion of the majority of the Court of Appeals of the District of Columbia relied upon a number of other cases which justify an inference contrary to the ruling of the Circuit Court of Ap-

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taxable to the beneficiary of a trust should be *the portion of the income of the trust 'which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary.'* The language of this section is so explicit that there can be no doubt that the taxable income of the beneficiary is the portion of the income of the trust *actually distributable to him*" (p. 23).

In his brief, he also contended:

"What is taxed . . . is the income *distributable* to the appellant under the will" (p. 26).

peals in the instant case on this point. Among these cases are: *Hubbell* v. *Burnet,* 46 F. (2d) 446 (C.C.A. 8th) certiorari denied 283 U.S. 840; *Baltzell* v. *Mitchell,* 3 F. (2d) 428 (C.C.A. 1st) certiorari denied 268 U.S. 690. See also *Roxburghe* v. *Burnet,* 58 F. (2d) 693 (App. D. C.). Those cases, either finding or assuming that certain income was distributable, held that it was taxable to the beneficiary. They certainly sustain Judge Groner's conclusion from them that, "If it is, it is taxable whether received or not." They also seem to compel his final conclusion that, in the converse case, "If it is not . . . it is nontaxable, even though received, as for instance, by mistake."

See also *McCaughn* v. *Girard Trust Company,* 19 F. (2d) 218 (C.C.A. 3rd).

The construction adopted by the court below enforces double taxation in cases like the instant case, thus violating the fundamental principle of our tax system. In the instant case the trustee distributed more than was distributable. According to the rule laid down by the court below, the trustee in such cases is taxable upon the net income, less the amount *distributable,* while the beneficiary is taxed upon the amount *distributed.* The excess of the distribution over the amount distributable is taxed twice, once in the hands of the trustee, who is only allowed to deduct what is *distributable,* and again in the hands of the beneficiary, who is taxed

upon everything *distributed.* Similarly if, owing to a mistake, the trustee paid income to the wrong person, that person would be taxed upon it, as well as the beneficiary who was entitled to it. This is contrary to what has been the uniform ruling under our income tax laws that when income was taxable to the trustee, the beneficiary later receiving the income paid no tax (T. D. 1906; Regulations 33, Article 75, T. D. 1944; Regulations 33, Article 29, revised January 2, 1918).

Such a rule is contrary to numerous decisions of the Board of Tax Appeals, in some of which the Commissioner has acquiesced.[7]

That this was not the intention of Congress is demonstrated by the fact that the Act contains no provision allowing a beneficiary of a trust any deduction for any amount which he receives wrongfully and repays. As none of the provisions for deductions is broad enough to apply to such a situation, it must have been contemplated that the test was not actual receipt of income from the trust, but the right to receive it.

In the court below in the companion case, the Commissioner argued:

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[7] *Pyle v. Commissioner,* 16 B. T. A. 218; *White v. Commissioner,* 25 B. T. A. 243; *McCrory v. Commissioner,* 25 B. T. A. 994; *Dixon v. Commissioner,* 25 B. T. A. 1164; *Newbury v. Commissioner,* 26 B. T. A. 101, acquiescence by Commissioner XI I. R. B. No. 32, p. 1; *Boston Safe Deposit and Trust Company v. Commissioner,* 26 B. T. A. 486; *Yukon Alaska Trust v. Commissioner,* 26 B. T. A. 635, acquiescence by Commissioner XI I. R. B. No. 39, p. 1.

> However, even if the beneficiaries restored the amounts in question, they would only be entitled to a deduction in the year of restoration and not during earlier years.

It is significant, however, that in the only case directly involving this point which we have been able to find, the Commissioner argued that no deduction could be made in the later year, and the Board of Tax Appeals so held. *Pyle* v. *Commissioner,* 16 B.T.A. 218. We believe that that decision was correct. The repayment of income from a trust received by mistake is certainly not within the category of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" which Sec. 214 (a) (1) of the 1921 Act and similar provisions of other Revenue Acts allow as a deduction.

None of the cases cited by the Commissioner in the courts below in support of his contention that the mere receipt of income by a beneficiary is sufficient to render it taxable, such as *North American Oil Consolidated* v. *Burnet,* 286 U.S. 417, involved Section 219 of the statute or any section having similar language, or throw any light upon the construction to be given to Section 219. In the *North American Consolidated* case, the Court pointed out that under the provisions of the sections there involved the taxpayer would be allowed a deduction for amounts repaid in a later year, a situation

which, as we have just pointed out, does not exist here.

Furthermore, the 1921 statute, as we construe it, requires that, of the income of a trust like this, the beneficiary is to return that part which is distributable to the beneficiary "*pursuant to the order governing the distribution,*" if there is such an order.

The order and decree of the California court settling the trustee's account (R. 39-41) was such an order. Under Section 1120 of the Probate Code of California:

> When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction.

This section contains elaborate provisions for an accounting by the trustee, such as was made in the instant case. Such a trustee acts constantly under the direction of the court. Whatever he does is tentative until his accounts are settled. In California, therefore, we have an instance of "the juridical conception that a testamentary trusteeship . . . is due to the court authenticating the will." (*In Re Ripley*, 167 N.Y.S. 162, 166.) To such a trustee we find those provisions of the Revenue Act of 1921 peculiarly applicable where they speak of an "order governing the distribution" of

income (subsection (b), subsection (d), subsection (e)).

But, even if the provision of the 1921 Act as to court orders is not applicable, nevertheless the amount received was not taxable unless it was rightfully *distributable,* and, as we point out below, this question is to be determined by the court having jurisdiction over the trust estate and not by any other court.

II.

THE ORDER OF THE STATE COURT HAVING JURISDICTION OVER THE TRUST ESTATE AND THE PARTIES DECREED THAT THE BENEFICIARY OF THE TRUST WAS NOT ENTITLED TO THE AMOUNTS IN QUESTION, AND THAT DECISION IS CONTROLLING HERE.

It should be borne in mind that the petitioner is not relying upon the decision of a court in the case of some other person. The decree of the Superior Court of California actually foreclosed the right of this petitioner to the very amount in question, and no decree of any other court in any other proceeding can now enlarge his rights as to that matter.

If, as we contend, the question is merely whether the income was distributable to the beneficiary *pursuant to the order governing the distribution,* there can be no question that the order of the Superior Court of California is conclusive. And

even apart from that provision, since present record shows that the question as to what was distributable to the beneficiary *pursuant to the instrument governing the distribution* has been decided by that court, that question is no longer open.

As this Court said in the recent case of *Burnet* v. *Harmel,* 287 U.S. 103, 110:

> The state law creates legal interests but the federal statute determines when and how they shall be taxed.

If, as we contend, the federal statute here involved taxes only income which was properly distributable, it is apparent that it is the state law which must determine what income was rightfully distributed. In applying the federal tax we must consider what substantive rights and obligations have arisen under the local law. Although so far as the federal government is concerned, proceedings between citizens in state courts are *res inter alios acta* and not binding upon the Federal Government by the doctrine of *res judicata,* nevertheless those judgments do give rise to rights and obligations upon which the Federal income tax depends. The income tax cannot be computed without giving effect to these judgments. As to this petitioner, the will must have the effect which the state court having jurisdiction has decided that it has. In view of its decision, the situation as to him is exactly the same as if the will had expressly provided that the trustee should withhold from distribution annually

amounts adequate to set up a reserve for depreciation. We submit that this proposition is established by this Court and that no decision of this Court conflicts with it.

Thus, in *Uterhart* v. *United States,* 240 U.S. 598, which involved the right to a refund of a federal succession tax, the Court, in order to determine the nature of the taxpayer's interest in the property, looked solely at the provisions of a decree of a state court; and said (p. 603):

> It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton* v. *Moore,* 178 U.S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees.

In *Keith* v. *Johnson,* 271 U.S. 1, a case involving federal income tax, this Court reversed its previous ruling as to whether the New York transfer tax was primarily payable out of the estate, and held that it was bound to follow a later decision of the state court on the question. See also *United States* v. *Kombst,* 286 U.S. 424, 426; *Michigan* v. *Michigan Trust Co.,* 286 U.S. 334, 342; *Roberts* v. *Lewis,* 153 U.S. 367. *Cf. Trainor Co.* v. *Aetna Casualty & Surety Co.,* No. 13, October Term, 1933 (decided

November 6, 1933); *Burgess* v. *Seligman,* 107 U.S. 20, 33-34.

Although there are decisions of this Court which hold that the federal courts are not bound in all cases to follow the construction of a will adopted by the state court, we believe that no such case deals with any federal statute, or involves a situation similar to that here involved, where the state court, for example, "had the settlement of this estate in its grasp and sole jurisdiction." See *McCaughn* v. *Girard,* 19 F. (2d) 218, 219.

Most of the decisions in the lower federal courts support our view. See, for example, *Commissioner* v. *Field,* 42 F. (2d) 820 (C. C. A. 2d); *Farwell* v. *Commissioner,* 38 F. (2d) 791, 795 (C. C. A. 2d); *McCaughn* v. *Girard Trust Co.,* 19 F. (2d) 218 (C. C. A. 3d); *Pitman* v. *Commissioner,* 64 F. (2d) 740 (C. C. A. 10th).

In *Commissioner* v. *Field, supra,* a case involving federal income tax on income received from a trust estate, Learned Hand, J., said:

> Hence the case turns upon whether, after the Illinois decree, Marshall had a present interest in the income of Henry's share assignable under the law of Illinois.
>
> * * * * *
>
> Under the trustees' contention Henry's share after his death was still subject to the provisions for accumulation, the restraints on alienation and the contingent remainders over. *We need not consider the validity of these for*

> *we must accept the decree* as holding that Henry's share was not so limited after his death.

And in *Farwell* v. *Commissioner, supra,* a federal estate tax case, the court said:

> Because the probate court ratified and approved every payment made by the guardian and no application for re-examination and correction was made within two years, or appeal taken, the decision of that court is final and conclusive. General Laws of Vermont, § 3712. Although the probate court is of limited jurisdiction, its acts, orders, and decrees, within the scope of its jurisdiction are as conclusive as those of any other court. *Sparhawk* v. *Buell's Administrator,* 9 Vt. 41; *Tryon's Administrators* v. *Tryon,* 16 Vt. 313. And the probate court has exclusive jurisdiction of the settlement of accounts of guardians.

Where, as in our case, the state court has exclusive jurisdiction of the settlement of accounts of trustees, its decision must, by like reasoning, be final and conclusive, whether the federal tax involved is an estate or an income tax.

The argument of the Commissioner and the holding of the court below fly in the teeth of Revised Statutes, Sec. 905, which provides that the records and proceedings of state court if properly authenticated

> shall have such faith and credit given to them in every court within the United States as they

> have by law or usage in the courts of the state from which they are taken.

See, in this connection, *Bradford Elec. Co.* v. *Clapper,* 286 U.S. 145, 155; *Hartford Life Insurance Co.* v. *Barber,* 245 U.S. 146; *Tilt* v. *Kelsey,* 207 U. S. 43; *Mitchell* v. *First National Bank,* 180 U.S. 471.

At the time when the Revenue Act of 1921 was passed (it was approved on November 23, 1921), the Commissioner took the position that the decision of local courts as to the distribution of income should control. Law Opinion of the Solicitor of Internal Revenue, No. 1013, promulgated in 1920 (2 C.B. 181, 183), discussing Section 219 of the Act of 1918, relating to the income from trusts, stated that the federal statutes and not the rule of the probate court must govern the question as to what constitutes income, but went on to say:

> The decisions of the local courts, however, as to the distribution of such items of income are important. *They determine by whom the income should be accounted for.*

We submit that the statement from the Solicitor's opinion, quoted above, is correct. Anyway it expressed the attitude of the Department when the Revenue Act of 1921 was passed, and the Act of 1921 contains no language indicating that Congress intended to adopt the contrary rule, which the Commissioner seeks to apply in the instant case. Con-

sequently Congress must be deemed to have approved this construction. (See authorities cited on p. 20, *supra*.)

The respondent in his brief in opposition to the petition for certiorari in this case sought to distinguish certain cases on the ground that in them the decree of the state court in question was entered before the tax year involved. We submit that his position is unsound.

In *McCaughn* v. *Girard Trust Company*, 19 F. (2d), 218 (C. C. A. 3d), *supra*, the court held that a decree of a state court was binding on the Government in a federal income tax case, although it was entered by consent long after the taxable year.

See also *Keith* v. *Johnson*, 271 U.S. 1, 8, *supra*; *Messinger* v. *Anderson*, 225 U.S. 436; *Farwell* v. *Commissioner*, 38 F. (2d) 791 (C. C. A. 2d), *supra*; *Appeal of Appell*, 10 B. T. A. 1225, 1231.

The situation is similar to that which was presented in cases in which the Circuit Court of Appeals for the First and Second Circuits had both held that a certain instrument was invalid as a testamentary disposition. Subsequently a state court in Rhode Island, which had jurisdiction over its probate, decided that it was valid as a testamentary disposition. In subsequent proceedings both of these Circuit Courts of Appeals reversed their previous decisions, holding that they were bound by the decision of the Rhode Island court.

Atwood v. *Rhode Island Hospital Trust Company,* 34 F. (2d) 18, 22 (C.C.A. 1st); *Boal* v. *Metropolitan Museum of Art,* 19 F. (2d) 454, 459 (C.C.A. 2d). In both of these cases, petitions for certiorari were denied by this Court, 280 U. S. 600; 275 U. S. 565.

From what we have said, it must be clear that the order of the state court simply declared what the rights which previously existed were. Would the Commissioner contend that he should not, and the courts should not, pay any attention to any state decision as to the taxpayer's rights merely because it is rendered after the end of the tax year involved or after the filing of the return? Or if not, when would he regard a decision as too late to be noticed? In many trusts the trustees do not file their accounts annually, and it will often happen that matters relating to rights upon which a tax depends will not be decided until after the end of the taxable year and after the return is filed. Of course, it may happen that the taxes are finally settled before any adjudication is made, and in such event the taxpayer may have lost his rights to refer to the applicable decision of the state court. But where, as here, the decision of the state court is in evidence, it is immaterial when that decision was made.

III.

THE DECISION OF THE CALIFORNIA COURT THAT THE TRUSTEE SHOULD HAVE MAINTAINED A RESERVE FOR DEPRECIATION WAS CORRECT.

If, as we contend, the decision of that court is controlling, regardless of its correctness, it is unnecessary for this Court to decide whether it was correct or not. But even if the decision of the court below as to the binding force of the decree should be upheld, we nevertheless insist that its judgment should be reversed on the ground that the decision of the California court was correct.

The opinion of the court below did not discuss this matter at all.

The decision of the Superior Court was required by the holding of the highest court of that state in *In re Gartenlaub,* 185 Cal. 648. In that case the trustee had purchased bonds at a premium. The court said (page 652):

> "*The existence of a corpus, principal, or fund is an essential element of the trust and the preservation of this principal until the termination of the life estates is indispensable to the fullfilment of the testator's plans.* Therefore, *any depletion* of the principal tends to frustrate the fundamental purpose of the trust and should be avoided and where the price paid for a bond consists of more than the par value thereof, that method of accounting should be adopted which will prevent the impairment of

> the principal unless the testator has clearly directed to the contrary. Otherwise the life tenant, who is entitled to receive only income, will, in effect, have received a part of the principal. In other words where a premium is paid, the ostensible interest yielded by the bond cannot be considered entirely as interest on the face value of the bond, for a sum in excess of the face value has gone into the investment and the amount of interest remains unchanged, resulting, necessarily, in a decreased rate of return. A portion of the nominal interest is, therefore, a repayment of the premium.

This is also the view taken by respectable authorities elsewhere.

See, for example, the following authorities which involve depreciation of real estate: *Matter of Jones,* 103 N. Y. 621; *Matter of Housman,* 4 Dem. (N. Y.) 404: *In re Crabtree,* 106 Law Times Reports (N. S.) 49, (decided by Court of Appeal, consisting of Cozens-Hardy, M. R., Fletcher Moulton, L. J., and Buckley, L. J.); Hill on Trustees (Am. ed.) pp. 592-593.

The principle as to the necessity of setting up a reserve to protect the interests of remaindermen has been applied in many cases to various other situations as, for example, to leaseholds: *Healey* v. *Toppan,* 45 N.H. 243, 266-267; *In re Hall's Estate,* 224 N.Y.S. 376, 381; *Gay* v. *Focke,* 291 Fed. 721; Perry on Trusts and Trustees, 7th Ed., Vol. II, par. 548. And in cases of bonds purchased at a premium

in such cases as: *New England Trust Company* v. *Eaton,* 140 Mass. 532; *In re Allis' Estate,* 123 Wis. 223; *Furniss* v. *Cruikshank,* 230 N.Y. 495; *Curtis* v. *Osborn,* 79 Conn. 555; *Ballantine* v. *Young,* 74 N.J. Eq. 572. Contrary to these cases are some cases in other jurisdictions.

There are, of course, many cases holding that a bequest or devise of a wasting asset, without provision for a reserve for depreciation, ordinarily requires no such reserve. This is not such a case. Here we have a general residuary devise. The assets originally covered by it "consisted largely of cash, bonds, stocks and notes" (R. 35). Such assets were not depreciable or wasting in their nature. In subsequent years the nature of the corpus of the trust property has changed. During the year here involved, it consisted almost entirely of improved real estate and hotel furniture. The improvements and furniture are highly depreciable. Under such circumstances, when a trustee acquires wasting assets, the life tenant should not be entitled to the whole rental or other income, but an adequate reserve must be set up in order to take care of the depreciation and protect the interests of the remaindermen.

The phraseology of the will in the case at bar should be given particular attention. The testator was dealing with an estate which consisted largely of nondepreciable assets. Naturally he made no specific provision for depreciation. Nevertheless, his gift to the life beneficiaries is only "the interest

or income," the remaindermen taking "the whole three thirds parts." This, we submit, must be construed as requiring a reserve to take care of the depreciation on depreciable assets in which the trustee subsequently invested the trust funds.

CONCLUSION

The applicable statutes must be construed to tax to the beneficiary only income which was properly distributable to her. This raises the question—what was the income of the trust estate which was properly distributable? That question has been determined by the court of competent jurisdiction, and no decision of any other court can give this petitioner any right to the amount on which the Commissioner seeks to impose a tax. Moreover, the decision of the California state court was correct. The Commissioner is consequently seeking to tax him on a fund to which he was not entitled and never can become entitled. This, we submit, he cannot do. The judgment of the Circuit Court of Appeals should be reversed, and the decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted,

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NOVEMBER, 1933.

APPENDIX.

FEDERAL STATUTES.

Revised Statutes, Section 905 (U.S.C. Title 28, Sec. 687):

The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. *And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.*

Revenue Act of 1921 (c. 136, 42 Stat. 227, 247):

ESTATES AND TRUSTS

Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased per-

sons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interest;

(3) Income held for future distribution under the terms of the will or trust; and

(4) *Income which is to be distributed to the beneficiaries periodically,* whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) there shall also be allowed as a deduction, without limitation, any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of section 214. In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section *the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order govern-*

ing the distribution, is distributable to each beneficiary, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement *there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary.* In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but *there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not,* or, if his taxable year is different from that of the estate or trust, then

there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under Section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

(e) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that *there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the*

distribution, is distributable during the taxable year to such beneficiary.

[Subdivision (f) of this section has no possible bearing upon the issues in this case.]

Revenue Act of 1918 (c. 18; 40 Stat. 1057, 1071):

ESTATES AND TRUSTS

Sec. 219. (a) [Identical with the corresponding subdivision of the Act of 1921.]

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that there shall also be allowed as a deduction (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph (4) of subdivision (a) of this section the *fiduciary shall include in the return a statement of each bene-*

ficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

(c) [Substantially the same as the corresponding subdivision of the Act of 1921.]

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but *there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year,* or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

[There was no subdivision in the Act of 1918

corresponding to section 219 (e) of the Act of 1921.]

Revenue Act of 1924 (c. 234; 43 Stat. 253, 275) *and of 1926* (c. 27; 44 Stat. 9, 32):[8]

ESTATES AND TRUSTS

Sec. 219 (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate

[8] The portions of the Acts of 1924 and 1926 bearing upon the present case are identical.

or trust shall be computed in the same manner and on the same basis as provided in section 212, except that

(1) There shall be allowed as a deduction (in lieu of the deduction authorized by paragraph (10) of subdivision (a) of section 214) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214, or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate of trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be

allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

(3) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

(c) For the purpose of the normal tax the estate or trust shall be allowed the same credit as is allowed to a single person under subdivision (c) of section 216, and, if no part of the income of the estate or trust is included in computing the net income of any legatee, heir, or beneficiary, then in addition the same credits as are allowed by subdivisions (a) and (b) of section 216.

(d) If any part of the income of an estate or trust is included in computing the net income of any legatee, heir, or beneficiary, such legatee, heir, or beneficiary, shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a)

and (b) of section 216 as are, under this section, required to be included in computing his net income. Any remaining portion of such amounts specified in subdivisions (a) and (b) of section 216 shall, for the purpose of the normal tax, be allowed as credits to the estate or trust.

(e) If the taxable year of a beneficiary is different from that of the estate or trust, the amount which he is required, under paragraph (2) of subdivision (b) of this section, to include in computing his net income, shall be based upon the income of the estate or trust for its taxable year ending within his taxable year.

[Subdivisions (f), (g) and (h) have no possible bearing upon the issues in this case.]

Revenue Act of 1928 (c. 852; 45 Stat. 791):

[The portions of this act relating to income of trusts and estates (sections 161 to 164, inclusive) are substantially the same as those of section 219 of the Acts of 1926 and 1924.]

Revenue Act of 1928 (c. 852, 45 Stat. 791, 799):

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * * *

(k) Depreciation. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held

by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

REGULATIONS OF THE TREASURY DEPARTMENT.

Regulations 62 (1922 Edition) promulgated under Revenue Act of 1921 as approved by the Secretary of the Treasury February 15, 1922:

Art. 345. ESTATES AND TRUSTS TAXED TO BENEFICIARIES.—In the case of (a) a trust the income of which is distributable periodically, (b) an ordinary guardianship of a minor, and (c) an estate of a decedent before final settlement as to any income properly paid or credited as such to a beneficiary, the income is taxable directly to the beneficiary or beneficiaries. Each such beneficiary must include in his return *his distributive share* of the net income, even though not yet paid him, but if his taxable year is different from that of the estate or trust, then he need only include in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within his taxable year. The regulations governing

partnerships are generally applicable to such an estate or trust. See articles 331-335.

* * * * * * * * * *

Art. 347. ESTATES AND TRUSTS WITH INCOME WHICH IS DISTRIBUTED PERIODICALLY, AND OTHER INCOME.—In the case of an estate or trust, the income of which consists both of income to be distributed to beneficiaries periodically and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with section 219 (b) and the tax shall be imposed and paid by the fiduciary in accordance with section 219 (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in section 219 (a) (4) which, pursuant to the will or trust deed, is distributable during its taxable year to the beneficiaries. *Each of such beneficiaries shall include, in computing his net income, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to him during the taxable year.*

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 129.

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF LOUISE P. V. WHITCOMB, *Petitioner,*

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONER.

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December, 1933.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR THE PETITIONER.

In this brief we undertake merely to discuss certain contentions of the Commissioner which are not alluded to in our main brief. We do not here undertake to answer those contentions of the Commissioner as to law or facts which are adequately covered in our main brief.

I.

THE CONSTRUCTION OF SECTION 219 CONTENDED FOR IN OUR MAIN BRIEF IS CORRECT.

Nothing in the Government's brief, we submit, answers the argument on this point in our main brief (pp. 14-27).

The Commissioner has from time to time taken several different positions as to the construction of the applicable provisions of section 219.

As we pointed out in our original brief (pp. 18-21) the regulations promulgated under the Revenue Acts of 1918 and 1921 (as well as those promulgated under later Acts) indicate that the Treasury Department construed the Act as we contend it should be construed, *i. e.*, as requiring the beneficiary of a trust to include in his return of income from the trust only such of that income as was properly paid to him. The Government does not contend that the applicable regulations have ever been in any way modified.

Moreover, for years in the cases which arose under this section the Commissioner assumed that it was essential to show that the beneficiary was properly entitled to income paid to him in order to tax it to him. In a number of these cases which are cited on p. 14 of the Commissioner's brief, beneficiaries of trusts contended that they were not taxable on all income from trusts properly received by them but only on their share of the statutory net income received by the trust after taking all deductions allowable in computing net income of individuals. The Commissioner, however, successfully contended that such beneficiaries were taxable on all income which had been properly paid (or even if it not paid, all which was payable) to them by the trustee, even if the total income thus taxed was in excess of the statutory net income. But in none of these cases, so far as we can ascertain, did the Commissioner take the position that the mere receipt of income by the beneficiary was conclusive (see p. 21 of our original brief, and particularly footnote 6 on pp. 21-22).

In the hearing of the instant case in the Circuit Court of Appeals the Commissioner, apparently for the first time, made the contention that the mere receipt of income by a beneficiary was sufficient to make it taxable to him, and that Court said (R. 158-159):

> It is clear that Congress when enacting the sections referred to intended to tax each year to the beneficiary of any trust the share of the trust income which was distributed to him in that year, and to tax to the trustee in his fiduciary capacity, any income which was not to be distributed. * * *
>
> * * * the principle then applicable is that where the beneficiaries receive the income, or in case they do not, the trust estate, is taxable upon the full amount of the income actually received during the year without deduction for depreciation sustained by the corpus of the trust.

But this statement of the court apparently is not satisfactory to the Commissioner. For he now argues (pp. 24-25 of his brief):

> We submit that income distributable within the meaning of Section 219 is income which was reasonably regarded by the parties as distributable at the time it was distributed.

And he now apparently disclaims any intention to argue that all "items distributed are taxable" (Footnote 8, page 25 of his brief).

A sufficient answer to this newest contention as to the construction of the statute is that it is supported neither by the language of the statute nor by the practice under it. Thus in *Hubbell v. Burnet,* 46 F. (2d) 446 (C. C. A. 8th), certiorari denied 283 U. S. 840, the Commissioner successfully asserted a deficiency against a beneficiary of a trust on the ground that he was entitled to larger payments from the trustee than he had actually received or ever claimed. In that case the Commissioner did not argue that the test was whether the parties (*i. e.,* the trustees and the

beneficiaries) reasonably regarded the amount in question as distributable: he boldly asserted that regardless of what the trustee and the beneficiaries had done, if the beneficiary was entitled to it, it was taxable to him. There is nothing in the report indicating that the Commissioner, the Board or the Court made any inquiry as to what was "reasonably regarded by the parties as distributable". The fact that one of the three judges of the Circuit Court of Appeals dissented on the question of the construction of the will would seem to indicate that the construction of the will which had been adopted by the trustee was not unreasonable, even though it turned out to be contrary to the views of two out of three of the judges of the Circuit Court of Appeals.[1]

The Commissioner relies upon the *North American Consolidated v. Burnet*, 286 U. S. 417, and various cases in the lower federal courts, holding that under sections 213 and 233 of the Act of 1921, and similar provisions, amounts received "under a claim of right"[2] may be taxable as income within the meaning of those sections in the year in which

---

[1] An important decision illustrating this principle is that embodied in the letter from the Acting Commissioner to the Corporation Trust Company, dated March 24, 1917 (Corporation Trust Company 1918 Service, pp. 366-367, 1919 Service, pp. 141-142). There had been a devise in trust, the decedent dying in September, 1913. Until 1916, however, distribution was impracticable. At that time the shares of the net income during the earlier years 1913, 1914 and 1915 were ascertained. The fiduciaries were then directed to make fiduciary returns in 1916 for the earlier years, reciting the interests of the beneficiaries. The beneficiaries were directed to make amended returns for the earlier years where their income was such as to require returns. The fact that actually a large amount of income was distributed in 1916 did not justify the imposition of a higher tax in that year upon all of that income. The income was allocated to the years in which it was *distributable*, rather than the one year in which it was *distributed*.

See also *McClung v. Commissioner*, 13 B. T. A. 335; *Appeal of Estate of Tyler*, 9 B. T. A. 255; and *Heywood v. Commissioner*, 11 B. T. A. 29.

[2] The argument that the beneficiary in the instant case received the amounts in question "under a claim of right" is somewhat strained. It must be obvious that this beneficiary, who was a widow, merely took what the trustee paid her; and there is nothing in the record which indicates that at the time of the receipt of this money she made any claim whatever as to what she was entitled to or that the matter which was later decided against her was then in any way brought to her attention. The situation is different from that in which a business man or a corporation has taken affirmative steps to collect the amount in question.

they are received, even though the right to these amounts is at the time disputed and even if it is ultimately determined that the taxpayer was not entitled to these amounts. We may concede that these decisions go so far as to hold that amounts received even wrongfully may constitute income in the year in which they are received, but none of these cases arose under section 219 and none of them throws any light upon the meaning of that section.

Under section 219, everything which is income must be returned either by the trustee or by the beneficiary and consequently nothing which is income escapes. But under section 219 the *beneficiary* of a trust is not required to return everything received by him as income of the trust but merely "that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not".

The Commissioner (Res. Br. 38-39) also argues that the words "order governing the distribution" in Section 219, cannot have reference to such an order as that of the probate court here involved. First, he contends that the order referred to in the statute cannot refer to an order entered after distribution is made. This contention is answered on pages 33-34 of our main brief.

Secondly, the Commissioner argues (Res. Br. 39-40) that the phrase "order governing the distribution" applies only to income collected by a guardian for an infant.

We submit that there is nothing in the language of the 1921 Act or any later Act supporting this contention. This is a strained construction, and it is not suggested by the Regulations which the Department issued construing this section. (See Article 345 of Regulations 62, p. 49 of appendix to our main brief.)

Subdivision (4) of subsection (a) does not use the word "order." The only reason why subdivision (4) of subsec-

tion (a) groups the two kinds of income which it does is that the legal title to the income mentioned in subdivisions (1), (2) and (3) in each case remains in the fiduciary until the end of the taxable year, whereas the legal title of the income treated in subdivision (4) does not remain in the trustee. Under subdivision (4), as soon as the *distributable* income becomes distributable, whether by virtue of a trust instrument or a court order, it is regarded for income tax purposes as passing to the beneficiary. Since a guardian is a mere curator and at no time has legal title, *all* of the income received by a guardian vests immediately in the ward. For these reasons, subsection (d) provides that the two classes of income mentioned in subdivision (4) of subsection (a) are not taxable to the fiduciary, but to the beneficiary. Subsection (b) makes provision for returns accordingly. There is nothing in any of this which requires that the word "order," as used in these later subsections, or in any other portion of the act, be restricted to orders directed to guardians.

In Section 219 of the 1924 and the 1926 Acts, the clause "pursuant to the instrument or order governing the distribution" does not occur in connection with the word "distributable". The omission of this clause is, however, without significance, as Congress did not intend to change the meaning of these provisions (See Senate Report No. 398, 68 Cong. 1st Sess., p. 25; House Report No. 179, 68 Cong. 1st Sess., p. 21). The 1924 and 1926 Acts do not, as the Commissioner's brief suggests (pp. 39-40), contain any reference to "court *orders*" or indicate that what is taxable to guardians or their wards is dependent upon what is distributed according to the directions of the court. All income collected by a guardian "which is to be held or distributed as the court may direct", regardless of how much of it is held and how much of it is distributed, is taxable to the ward. (See Sec. 219 (b) (2) printed in the Appendix, p. 46, of our main brief; Regulations 65, Art. 342 (2); Regulations 69, Art. 342 (2).)

The Commissioner now suggests, rather faintly, (Res. Br. pp. 40-43) that the beneficiary may be entitled to a deduction in the year of repayment of the sums improperly paid to him, but the only section of the statute which he suggests gives any such right is that allowing deduction for "losses sustained during the taxable year * * * if incurred in any transaction entered into for profit, although not connected with the trade or business." It seems obvious that the beneficiary's passive receipt of a payment from the trustee cannot be regarded as a "transaction entered into for profit", and the Government cites no case involving any such facts.

The outstanding significant matter in this connection is that in the only case in which this point was raised, the Commissioner argued and the Board of Tax Appeals held that no such deduction could be made. *Pyle v. Commissioner,* 16 B. T. A. 218.

II.

OUR CONTENTION AS TO THE EFFECT OF THE ORDER OF THE STATE COURT IS CORRECT.

Most of the argument in the Commissioner's brief to the contrary is, we submit, answered in our main brief, pp. 27-34.

None of the Supreme Court cases which the Commissioner cites deals with the taxability of property, the rights to which have been settled by state courts of appropriate jurisdiction. Although ordinarily in a new controversy the federal courts may decline to follow state decisions, this, we submit, cannot be so where the question is merely what property rights the taxpayer has and the rights of the taxpayer have actually been settled by a state court of competent jurisdiction. The federal courts cannot change that decision or in any way enlarge the taxpayer's rights, and if they assume to hold, contrary to the decision which settled his rights, that he had other or greater rights, the effect of the decision of the federal courts is merely to im-

pose a tax on something to which as a matter of fact and of law the taxpayer was not entitled and to which he can never become entitled. If our construction of the tax act is correct, Congress did not intend to permit any such anomalous situation to exist.

Let us suppose that the probate court had held that the taxpayer was entitled to the amount in question. Could the taxpayer then contend, in a tax suit, that the decision of the probate court was incorrect and that the federal court should pass on the question of his rights and disregard the decision of the state court? The Commissioner, to be consistent, must admit that every beneficiary of a trust has this right. Such a procedure would open the federal courts in tax cases to all kinds of controversies which they were never intended to decide.

We submit that a reading of the cases cited in the briefs will disclose no case in this Court and only a few cases in the lower federal courts which support the view of the Commissioner. Those few cases are, we submit, wrong, and contrary to the well reasoned cases cited in our main brief (pp. 29-34).

One argument in the Commissioner's brief under this point may deserve attention inasmuch as it is not alluded to in our main brief. That is that the decree of the state court is not entitled to the effect ordinarily accorded to the judgments of state courts, because, as the Commissioner asserts, "it was nothing more than a friendly settlement without any real contest and did not represent a considered adjudication of the questions involved."

In the first place, we submit that the argument, even if based on facts properly proved by evidence or found by the Board, would be unsound. The decree is either valid or it is invalid. The Commissioner's brief expressly explains that he does not contend that the order "was invalid or improper." (Footnote 12, p. 34.) In his briefs in the courts

below, the Commissioner expressly admitted: "We do not charge collusion." At no time has the Commissioner contended that the state court did not have jurisdiction of the account of the trustee and the right to the income of the beneficiary here involved. There is no evidence to support such a contention, and the Board expressly found that the court "has jurisdiction over the trust until its termination for the settlement of accounts and for other purposes" and that "all of the parties interested in said trust estate * * * were notified of the filing of said account of said trustee, and of said objections, and were represented by counsel at the hearing thereon." (R. 38-39.) Therefore the decree was valid.

We need not consider the effect of a consent decree, for there is no finding or no evidence that this was a consent decree. (See the decree, R. 140-144.) The fact is, as is reasonably apparent from the record, that the decision was not agreed to by the parties, but was made by the court itself after consideration of the various contentions of the parties in interest. The fact that subsequent to the decision, there was agreement as to the *form* of certain parts of the decree, is, of course, entirely immaterial. The court did hear and decide the issues—it disallowed certain objections to the account and sustained others. (R. 143-144.)

If the Commissioner had wished to raise the point which he now suggests, he should have taken certain steps which he did not take; and we submit that, even if his contentions are material, there is no sufficient basis of fact in the record to support them. He raised no such issue by his answer before the Board (R. 29-31). He obtained no finding from the Board to the effect that the decision of the state court was not, as it purports to be, its considered judgment. He introduced no evidence before the Board tending to support such a finding. In his petition for review by the Circuit Court of Appeals for the Ninth Circuit and in his petition for review by the Court of Appeals for the District of Columbia he alleged that the state court "found" that the trustee's distribution was improper, and he did not

suggest that this was not the considered judgment of the state court (R. 57-58 and R. 5-6 in No. 146). Neither of the reviewing courts has found that it was not the considered judgment of the state court. In this situation we submit that he cannot now ask this Court to scrutinize the evidence and draw inferences from it in order to reach a conclusion of fact which has not been found.

If, however, this Court does care to scrutinize the situation, the following matters should be considered: The Superior Court did not allow the objections of the remaindermen in their entirety. One of them, relating to another matter, was disallowed (R. 60). This would indicate that the proceedings were not cut and dried, but that the Court exercised its own judgment. The fact (stressed by the Commissioner's brief) that the hearing was held and the decrees entered soon after the petition for allowance of the accounts was filed, is without significance. It is, of course, not unusual, in matters of this kind, for a trustee and his counsel to notify the beneficiaries informally of what is going to be done, and to postpone the filing of the petition until after discussion of all phases of the matter with them and their counsel and until after the time for a hearing, etc., has been fixed. Whether the proceeding was "friendly" or not must be unimportant. Obviously it is immaterial whether the issue aroused personal hostility between the parties or whether they and their counsel submitted the matter to the Court in an expeditious and amicable way.

It seems to us absurd to believe that the life tenants would voluntarily have given up what they lost by the decrees merely in the hope of obtaining the slight reduction in the federal taxes which is involved. They were ordered to pay back over $250,000 for the years involved in the pending cases, and the tax liability in controversy is only a very small fraction of this amount. Moreover, they were ordered to pay back over $300,000 for previous years, and the trustee was instructed to reserve reasonable amounts for depreciation annually in the future until the

termination of the trust. On May 28, 1928, several months before the hearing in the Superior Court, the Revenue Act of 1928 had been approved. Section 23 (k) of this contained a provision which would relieve the life tenants from taxation under it on amounts representing depreciation, even if such amounts were actually and rightfully received by the beneficiaries. (This provision is copied in the Appendix, pp. 48-49 of our main brief.)

Consequently the decree affected large amounts which would not be involved in any questions of federal taxation. It is uncertain who will benefit by the decree and by the repayments, aggregating over $622,000, which it requires. It may be one or both branches of the family or neither. It may be Harvard College.

The Commissioner comments on the fact that the "decree directs repayment of amounts representing depreciation only for the year beginning in 1913, the income tax years." It is a fact that the depreciation involved did begin with 1913. The reason for this is merely that no material was available for calculating readily what the depreciation, if any, was before that time. It was during that year and soon afterwards that the important buildings of the trust were first used. (Although these facts may not appear clearly in the record, examination of the record does show that most of the expenditures for improvements were made shortly before or shortly after 1913—R. 70 to 71.)

Answering another contention of the Commissioner as to the decree, we submit that it was natural and proper that the decree should be framed in such a way as to make the beneficiaries rather than the trustee liable for the amounts erroneously paid. For it is well settled that although a trustee is liable, he may, in the absence of bad faith or unusual circumstances, collect from the beneficiaries or deduct adequate amounts from their income in the future. (See Restatement of Trusts by American Law Institute, Sec. 246.)

Nor was it unnatural that the remaindermen who were of age should have signed the notes of their mother. This was

proper security for the trustee to obtain. Making notes payable at the termination of her life estate and without interest was proper. If all of the amounts in question had been repaid in cash, the life tenants would have been entitled to the income from that amount, and the remaindermen would not be entitled to the principal of the fund until the termination of the life estate.

The Commissioner is in error in asserting (p. 41 of his brief) that "No notes or other obligations evidence even a simulated intention to repay the 93 per cent" of his share which the petitioner did not pay in cash.

The truth is that all of the distributions of depreciation have been repaid either by cash or by notes. The state court fixed the total amount of depreciation at $622,434.11 (R. 141-142). The repayments were as follows:

Appendix 8,	$305,867.06	(R. 145);
Appendix 9,	$118,353.85	(R. 146);
Appendix 10,	$69,159.35	(R. 147);
Appendix 11,	$118,353.85	(R. 148);
Petitioner's payment	$10,700.00	(R. 42);
Total	$622,434.11	

The present confusion of the Commissioner is due to the fact that the estate of Louise P. V. Whitcomb had been largely distributed prior to the entry of the decree of the Superior Court, and consequently a large part of the repayments for which her estate was liable was made by notes of her next of kin (R. 145-146 and R. 148).

Some of these facts may not appear clearly in the record, but this merely illustrates the futility of contentions such as the Commissioner now makes, which are not definitely established by the record which he presented in the courts below.

III.

OUR POSITION ABOUT THE NECESSITY FOR A DEPRECIATION RESERVE IS CORRECT.

The Commissioner cites no California authority whatsoever in contradiction of our argument, or in opposition to the decree of the probate court.

Undertaking to state the "correct rule", the Commission insists that:

> If the trustee deducts the cost of repairs and renewals in computing the net income payable to life beneficiaries he may not also take a deduction for depreciation. (Res. Br. p. 10; see also p. 17.)

This implies the converse that:

If the trustee does *not* deduct the cost of repairs of renewals in computing the net income payable to life beneficiaries, he *must* take a deduction for depreciation.

The Commissioner argues that the record does not show the trustee did not deduct repairs and renewals, and advances his "inference" to the contrary. (Res. Br. p. 10; see also p. 17.)

We submit the record is clear.

The remaindermen's objection (R. 129-132), verified by the oath of their attorney (R. 131-132), after setting up the depreciation sustained, says: "that no reserves *or other provision for such depreciation* have been made by the trustee". (R. 130.)

The trustee's answer, also under oath (R. 133-135), admits this expressly. (R. 133.)

The Probate Court's order (R. 136-139) and the amended order (R. 140-144) both find the amount specified was "a proper amount to be allowed for depreciation" (R. 137, 141), and that the income had been disbursed "*without* deduction of reserves *or other provision for depreciation.*" (R. 138, 142.)

Despite this, the Commissioner suggests (Res. Br. p. 18) the possibility that provision for repairs and renewals was

made out of the "Expenses paid", shown in the account. (R. 110-126.)

If so, it would have left little to meet the ordinary expenses of the trust, taxes and insurance. For sixteen years the total depreciation was $622,434.11. (Res. Br. p. 41, note 14.) The total "expense" for the same period was about $100,000 greater. For the year 1921, "expense" was $51,947.10 (R. 121), while depreciation was $43,003.16 (R. 36). On "an investment of more than $2,000,000" (Res. Br. p. 18), in a hotel, local taxes must have been more than $100,000 in sixteen years, more than $8,000 for the year 1921.

The Commissioner's suggestion, moreover, is contrary to the Board's finding that "the *estate* suffered exhaustion, wear and tear" in the figures named (R. 36).

If all the exhaustion, wear and tear on the specific properties for the estate had been made good, as the Commissioner suggests, by repairs and renewals out of current income, it could not have been true that the *estate as a whole* had suffered exhaustion, wear and tear.

The Commissioner's first footnote (Res. Br. p. 19) intimates, somewhat in this connection, that "The burden of proof is on the petitioner."

That burden was on petitioner before the Board, and petitioner sustained it there. The Commissioner is attacking the finding the Board made in favor of the petitioner. He is bound by the stipulation that these findings "insofar as they are not inconsistent with the foregoing are agreed to be correct and to be fully supported by adequate and competent evidence." (R. 66.) So far as the record goes, the burden of showing error on the part of the Board rests, not with us, but with the Commissioner.

The general rules as to depreciation are as applicable to property held in trust as to any other property. Wherever depreciation questions arise, whether under trusts, under

income tax laws, or, for example, in public utility rate cases,[3] they should be solved by a consideration of sound principles of accounting and "the ordinary business customs with respect to depreciation or obsolescence." (Am. Law, Inst. Restatement of Trusts, Tentative draft No. 4, Section 231, Comment (e)[4].)

Business men and accountants use two different methods to provide for the retirement of property exhausted in use. Where renewals are frequently necessary, and are carried on as a regular part of the program, as with the rails and ties of a railroad, the capital accounts are left alone, and the current cost of renewals, like any other current expense, comes out of current income. Major items, however, such as buildings, machinery, etc., are not susceptible of such treatment. Renewals are required at irregular intervals. Their cost is such that current income could not meet it. The practice there is to charge against income an annual amount based upon the expected life of the property, crediting these annual installments to a reserve against which to charge the cost or value of the property when it is ultimately retired. Either one of these methods may be used, depending upon which is appropriate to the situation. Or there may be a combination of the two.[5] The sheets, glassware and kitchen utensils mentioned by the Commissioner (Res. Br. p. 18) might be regarded as short lived and taken care of out of current income, while the more substantial items, pillows, rugs and furniture, and, above all, the buildings, would properly be subjects of a reserve.

The decision of the Commissioner's predecessor, allowing this depreciation deduction on the trustee's fiduciary return, just as well as that of the probate court requiring the reserve, and that of the Board finding the estate had sustained exhaustion, wear and tear, involved investigation of all the facts and accounting methods,

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[3] Cf. *United Railways v. West*, 280 U. S. 234, 253-254, 259-273.

[4] *Saliers, Depreciation*, p. 544, lays down the customs for hotel properties.

[5] *Ibid.*, pp. 39-47.

and a determination that a depreciation deduction was proper.

The Commissioner makes inconsistent suggestions regarding a distinction between the furniture and the improvements. The first suggestion (Res. Br. p. 18-19, note 4) would deny the depreciation of furniture, but permit it of improvements. Later the opposite position is taken (Res. Br. pp. 21-22 and note 6) that furniture is depreciable, but not improvements. No reason is offered for any such distinction. The depreciable character of each is notorious.

The Commissioner's final suggestion is that since any *increase* in the value of *land* goes to the remaindermen, he should bear any *decrease* in the value of the *improvements* (Res. Br. pp. 22-23). The two ideas are not comparable. Land is *not* a wasting asset. Its value may increase or decrease with the general market or specific conditions. Improvements, however, like furniture or machinery, while they may *possibly* increase in value, will certainly be mere junk at the end of their useful life. The same is true of a building. With depreciation we have not a "risk of loss", to use the Commissioner's phrase, (Res. Br. p. 23), but a certainty of loss. There is no difference between an asset which is a wasting asset due to its depreciable character and any other wasting asset, such as a valuable leasehold or a bond purchased as a premium, as in the cases we have already listed (Pet. Br. pp. 36-37).

The cases cited by the Commissioner do not sustain his position on this point.

Hubbell v. Burnet, 41 Fed. (2d) 446, 450; Res. Br. p. 20, is the only one of the numerous tax cases which purports to construe a trust instrument and determine whether a trustee was under obligation to maintain a depreciation reserve. The trust instrument there involved, however, was a deed in no way similar to the Whitcomb will. The *Hubbell* decision was based upon the specific provisions of

that trust deed, and does not assist in the construction of the Whitcomb will.

Whitcomb v. Blair, 25 Fed. (2d) 528; Res. Br. p. 20; did not construe the Whitcomb will. In his 5th footnote (Res. Br. p. 21), the Commissioner makes the direct statement "this question was decided in *Whitcomb v. Blair,* not assumed". Apparently, this note was written under some misapprehension and without an examination of the briefs or pleadings in *Whitcomb v. Blair.* The taxpayer there never contended that she was not entitled to the sums which she received. The Commissioner's brief in the Court of Appeals of the District of Columbia in that case states:

> The appellant (*i. e.* the taxpayer) has not contended that the proper construction of the will in question is not in accordance with the general rules which are mentioned above (p. 12), * * * Neither in the record before the Board of Tax Appeals nor in the brief of the appellant appears any evidence or any contention that the proper construction of the will in question is not in accordance with the general rules above mentioned. (p. 13.)

This is the correct contemporaneous statement of the predecessor in office of the present Commissioner, that the question of construction was not raised in *Whitcomb v. Blair.* It follows that it could not have been decided in that case.

The Commissioner also cites *Roxburghe v. United States* (64 C. Cls. 223; Res. Br. p. 20). In that case the Court spoke of "her distributive share. The amount of it is not in dispute." There was no attempt to construe the instrument to determine what the distributive share was.

Smith v. Keteltas (62 App. Div. 174), merely held that it was impracticable in that case to estimate the amount of the depreciation. That condition does not exist in our case, where both the probate court and the Board, without difficulty, have found the amount of the depreciation for each of the years in question.

Matter of Chapman (32 Misc. 187; Res. Br. p. 21), was a case of a specific bequest of a vessel, and comes within the exception to the general rule which we have already mentioned (Pet. Br. p. 37), where wasting assets are bequeathed specifically. (See, for example, Perry on Trusts, 7th Ed. Vol. 2, par. 548, Restatement of Trusts, Section 231, comment f(1)).

The Commissioner cites Restatement of Trusts Section 225 comment i; and other authorities as holding that

> permanent *replacements and* improvements are not chargeable against the income.
> (Res. Br. p. 22.)

These authorities deal not with *replacements,* mere restoration, but with real improvements, new construction and investment. The Restatement recognizes the duty of the trustee to preserve the principal (Sec. 225 (1) (b) to create proper reserves out of income (*ibid* comment d) and to amortize improvements added by the trustee (*ibid* comment k and illustrations 6 and 7).

In connection with *Whitcomb v. Blair,* the Commissioner's footnote 5 (Res. Br. p. 21) intimates that he asks to be relieved of his stipulation (R. 177) so as to contend that the cases of the petitioner in Nos. 139, 141 and 144 should be decided on the ground of *res judicata.* This is the first time the Commissioner has made such a suggestion. The answers are clear enough.

First, there is no plea of *res judicata.*

Second, There is no evidence in the record to support this contention.

Third, This point is not assigned as error in the Commissioner's petitions for review in the Court of Appeals.

Fourth, the construction of the Whitcomb will was not in issue or determined in *Whitcomb v. Blair.* One relying upon the plea of *res judicata* would have to establish that the question was in issue and determined. The Commissioner has not attempted to do so. What we have already

said, *supra*, p. 17, indicates sufficiently that the question was not in issue in the earlier case.

In support of this suggestion of *res judicata*, the Commissioner cites *Southern Pacific R. R. v. U. S.*, 168 U. S. 1. (Res. Br. p. 21, note 5.) The distinction between that case and the case at bar is obvious. In that case the earlier pleadings and proceedings were in evidence, and the Court held under its rule that, in effect, it had been pleaded in the later proceedings. This Court, over fifteen pages of its opinion, analyzed the earlier proceedings carefully, in order to ascertain whether in them the precise question involved in the later proceedings had been "put in issue and directly determined", for only if it had, were the earlier proceedings binding in the later proceedings (pp. 48-49).

The Commissioner relies (Res. Br. pp. 10, 23-24) upon "practical construction" of the will. This was impossible. The remaindermen were minors. Those who attained majority and filed exceptions were in no way parties to the transactions by which the life beneficiaries were over-paid. The trustee could not bind the others. Even if the adult life beneficiaries knew they were over-paid, their acquiescence could not bind their issue who were the real ones prejudiced.

Respectfully submitted,

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December, 1933.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

Nos. 129–131

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF Louise P. V. Whitcomb, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 32–53) is reported in 22 B.T.A. 118. The opinion of the Circuit Court of Appeals (R. 154–160) is reported in 62 F. (2d) 733.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1933 (R. 161). The time within which a petition for certiorari might be filed was extended by a Justice of this Court to include June 8, 1933. The petition for writs of certiorari was filed June 6, 1933. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A life beneficiary of a testamentary trust received and retained before and during the taxable years the full amount of her distributive share of the trust income undiminished on account of a depreciation reserve or otherwise.

The question presented is whether the taxable status of income thus received was altered by the entry of a probate court order in a friendly settlement of the trustee's account, some years after the taxable period, holding that depreciation should have been deducted, and in pursuance of which a small, unidentified sum was repaid to the trustee, on account of a depreciation reserve.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 17–18.

STATEMENT

The facts are not in dispute and so far as material may be summarized as follows:

From 1889 until her death on June 14, 1921, Louise P. V. Whitcomb was the widow of A. C. Whitcomb who died testate a resident of California (R. 34). By his will, A. C. Whitcomb created a trust in which his widow and two children, Adolph and Charlotte Andree, were life beneficiaries (R. 34-35). After the death of Adolph in 1914, his share of the income was

paid to his widow, Marguerite T. Whitcomb, and to his two children Lydia L. Whitcomb and Louise A. F. E. Whitcomb (R. 36–37). The will contained no directions with respect to the manner in which the trust income should be computed, accounts kept, or depreciation provided for (R. 35).

The trust property originally consisted chiefly of non-depreciable assets, but improved real estate subject to depreciation was substituted by a process of gradual conversion (R. 35–36; 68–72). The successive trustees accounted annually until 1902 but no formal account was filed thereafter until 1928 (R. 38, 110). The surviving trustee filed fiduciary returns for the years 1921 to 1926, inclusive, involved in these cases, deducting in the computation of the net income of the trust an amount representing exhaustion, wear, and tear sustained by the trust property. He did not withhold from the beneficiaries to whom income payments were being made the amount covered by the depreciation deduction and each of the beneficiaries received his or her ratable share thereof during the taxable period just as in all preceding years. (R. 37–38.)

Certain of the beneficiaries, including the petitioner's decedent, disputed the determination made by the Commissioner of Internal Revenue for the years 1917 to 1920, inclusive, each contending that she was wrongfully taxed in those years in respect to depreciation which had been allowed as a deduction in determining the net income of the trust for the corresponding years. The Board of Tax Appeals

approved the Commissioner's determination in these cases, concluding that depreciation, which affects only capital assets and not income, may not be deducted by life beneficiaries. *Appeal of Louise P. V. Whitcomb*, 4 B.T.A. 80; *Marguerite T. Whitcomb* v. *Commissioner*, 5 B.T.A. 191, affirmed *sub nomine Whitcomb* v. *Blair*, 25 F. (2d) 528 (App.D.C.).

On September 5, 1928, more than two years after the assertion of the deficiency against this petitioner and five months after the decision of the Court of Appeals in *Whitcomb* v. *Blair*, *supra*, the trustee filed his account for the period February 23, 1903, to February 23, 1928, and prayed for its approval (R. 110–128, 136). The remaindermen, Napoleon Charles Louis Lepic and Charlotte de Rochechouart, aliens residing in France, filed objections to the account covering the years 1913 to 1927, inclusive, on the second day after it was filed (R. 129–132, 136). The trustee answered four days later (R. 133–135). On September 19, 1928, the court entered a decree (R. 136–139) in which it set forth the amount of depreciation of the property of the trust from 1913 to 1927 as determined by the United States Government in connection with the income-tax returns of the trust and sustained the remaindermen's objections to the trustee's account in so far as the trustee had failed to withhold from distribution to the beneficiaries amounts sufficient to offset the depreciation sustained by the trust property. The beneficiaries were ordered to repay to the trustee the overpayments they had received during the years.

1913 to 1927 on this account "by making, executing and delivering to said Trustee their respective promissory notes, payable without interest at the termination of said trust to the order of the remaindermen" (R. 138–139). An amended order filed the same day eliminated reference to the proposed notes (R. 140–144). Notes were in fact executed by or on behalf of the several beneficiaries other than the petitioner's decedent (R. 145–148). Although Napoleon Charles Louis Lepic and Charlotte de Rochechouart were remaindermen and not life beneficiaries and hence in receipt of no income from the trust they joined in the note of their mother, Countess Charlotte Andree Whitcomb Lepic (R. 145). A payment of $10,700 was made to the trustee by the estate of Louise P. V. Whitcomb (R. 42). The record does not disclose on what account or with respect to what year or years this payment was made.

The life beneficiaries did not include in their returns for the years in question the amounts paid to them by the trustee which reflected their proportionate shares of the depreciation sustained and deducted on the fiduciary returns of the estate. The Commissioner of Internal Revenue increased the income shown on the several returns by the addition of these amounts and determined deficiencies accordingly (R. 42). The Board of Tax Appeals, six members dissenting, set aside the determination of the Commissioner (R. 42–54). The Circuit Court of Appeals reversed the order of the Board (R. 161).

ARGUMENT

The petitioner's decedent was a life beneficiary of a testamentary trust. The trust did not in terms require the trustees to set aside a reserve on account of depreciation. Nor can such a provision be read into the instrument, for there were no depreciable assets in the estate when the trust was created. For some thirty years prior to the taxable period the life beneficiaries, including the petitioner's decedent, received and retained the full amount of their distributive shares of the trust income without question. The propriety of taxing the full amount of these distributions to the recipients was tested in *Whitcomb* v. *Blair*, 25 F. (2d) 528 (App.D.C.), and *Appeal of Louise P. V. Whitcomb*, 4 B.T.A. 80.[1] These decisions held that the distributive shares of the beneficiaries must include what they actually received and that depreciation, which affects only capital assets and not income, may not be deducted by life beneficiaries.[2] The earlier rulings serve to narrow the

[1] *Whitcomb* v. *Blair* related to the 1918 tax against Marguerite T. Whitcomb. *Appeal of Louise P. V. Whitcomb* related to deficiencies asserted against Louise P. V. Whitcomb (petitioner's decedent) and Charlotte A. W. Lepic for 1917, 1918, 1919, and 1920, and Marguerite T. Whitcomb for 1919 and 1920.

[2] The same result has been reached in many other cases: *Baltzell* v. *Mitchell*, 3 F. (2d) 428 (C.C.A. 1st), certiorari denied, 268 U.S. 690; *Codman* v. *Miles*, 28 F. (2d) 823 (C.C.A. 4th), certiorari denied, 278 U.S. 654: *Abell* v. *Tait*, 30 F. (2d) 54 (C.C.A. 4th), certiorari denied, 279 U.S. 849; *Kaufmann* v. *Commissioner*, 44 F. (2d) 144 (C.C.A. 3d); *Hubbell* v. *Burnet*, 46 F. (2d) 446 (C.C.A. 8th), certiorari denied, 283 U.S. 840; *Codman* v. *Commissioner*, 50 F. (2d) 763 (C.C.A. 1st); *Roxburghe* v. *Burnet*, 58 F. (2d) 693 (App. D.C.), certiorari denied, 286 U.S. 567; *Roxburghe* v. *United States*, 64 C.Cls. 223.

issue, so that it is now necessary to inquire only whether the court below erred in declining to hold that the opposite result must now be reached as a result of the judgment of the State probate court.

Even if it be assumed that this is a case where the operation of the Federal taxing statute is by necessary implication made dependent upon local law (*Burnet* v. *Harmel*, 287 U.S. 103), there is no adequate showing that the local law requires a conclusion different from that reached below. The petitioner cites only one local decision to show the existence of a State rule of property, *Estate of Gartenlaub*, 185 Cal. 648. That case holds that in California a trustee is required to set aside from income amounts adequate to amortize the premium paid upon the purchase of bonds. We do not question the correctness of that decision; we do question its application to the present situation.

Nor is the petitioner's case established by the order of the state probate court entered with respect to this particular trust. That order is not controlling here on the basis of *res adjudicata*, because the United States was not and could not have been a party to the proceeding in which it was entered. It is equally obvious that the decision is not binding here as an *in rem* decree; there was no *res*, no question of title to specific items of property. The only effect therefore which can be given to the order is that resulting from the consideration and respect which is always accorded to the decisions of

State courts. Even a decision by the highest court of a State is not binding when the same question is presented in a Federal court unless it involves a construction of a State constitution or statute, a decision on descent and distribution under State laws, or unless it is part of a series of decisions constituting a well-established State rule of property. *Burgess* v. *Seligman,* 107 U.S. 20; *Barber* v. *Pittsburgh &c. Ry.,* 166 U.S. 83; *Kuhn* v. *Fairmont Coal Co.,* 215 U.S. 349; *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.,* 276 U.S. 518, 529–531. In *Lane* v. *Vick,* 3 How. 464, 476, this Court said:

> * * * this court do not follow the state courts in their construction of a will or any other instruments, as they do in the construction of statutes.

And in *Barber* v. *Pittsburgh &c. Ry., supra,* the same rule was repeated (p. 100):

> But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights.

The question involved in the State decree here was perhaps not strictly one of the construction of language in a will, but rather one of the rule to be

applied where the will contained no express provision. But in the absence of a well-defined State rule of property, State decisions are not binding on the Federal courts in either class of cases.

The decision below is not only in accord with these decisions of this Court, but it is directly supported, we submit, by another case involving facts closely similar to those here presented. *Ford* v. *Commissioner,* 51 F. (2d) 206 (C.C.A. 6th), certiorari denied, 284 U.S. 666. There executors made distribution of certain stocks to named beneficiaries in 1920 who received substantial dividends thereon in 1922. The distribution was premature as a matter of State law and in 1926 the appropriate probate court undertook, apparently on its own motion, to set the distribution aside ordering it to have been "without authority, illegal and of no effect" (p. 207). The distributees were commanded to account to the executor for the principal and income from the date of distribution. The matter was handled entirely by book entries. The Circuit Court of Appeals, in upholding the taxation of the dividends to the beneficiaries, clearly indicated the proper criterion to be the actual receipt and retention during the year in question of what is then considered to be income. The court said (p. 207):

> If taxes regularly assessed could be invalidated, an indefinite number of years later, by a consent judgment purporting to vacate the title of the taxpayer to the fund he had reported as income, the necessary system of tax collection would be much impaired.

See also *Jackson* v. *Smietanka*, 272 Fed. 970 (C.C.A. 7th); *Wear* v. *Commissioner* (C.C.A. 3d), decided May 26, 1933, not yet reported but may be found in 333 C.C.H. 8858.

The petitioner asserts several conflicts. But all of the cases relied on are, we submit, distinguishable. In *Uterhart* v. *United States*, 240 U.S. 598 (cited at Pet. 9), there had been a decision of the State court as to the meaning and effect of certain provisions in a will at the time of probate. The question presented to this Court was the application of the Federal legacy tax to the interests so established. The United States admitted the State decree to be binding (240 U.S. at 603). If the language of the court orders upon which the petitioner here relies had been incorporated in the decree of distribution, and if thereafter distribution had been made in accordance with such orders, the *Uterhart case* might be in point. However, the decree of distribution no more requires the creation of a reserve for depreciation than the will itself. (See R. 100–101.) In reality it sanctioned the course actually followed by the trustee for more than a third of a century. Years after the rights of the United States attached, the State court attempted by means of a proceeding to which the United States was not a party to deprive it of rights already accrued under a Federal statute.

We submit that the two situations are clearly distinguishable.

Commissioner v. *Field,* 42 F. (2d) 820 (C.C.A. 2d), also relied upon by the petitioner as creating a conflict (Pet. 9), seems likewise distinguishable. There the taxpayer was the beneficiary of a trust created by the will of his deceased grandfather. Prior to the taxable year involved (see 15 B.T.A. 718), a decree had been entered by a state court of competent jurisdiction construing the will and ruling that the taxpayer received his interest free of any restraints on alienation. Thereafter, the taxpayer assigned a portion of his interest, and he did not in fact receive the income from this portion in the year in question. The question presented in the Federal court was whether the taxpayer was nevertheless taxable on this assigned income. Since the decree of the state court was entered before the tax year involved, and since the taxpayer never in fact received the income in question, the decision is obviously distinguishable, we submit, from the present case where the taxpayer received and enjoyed the income and the decree of the state court was not obtained until after the tax controversy had arisen may years later.

Brief mention is also made (Br. in Sup. 17–18) of an earlier case, *McCaughn* v. *Girard Trust Co.,* 19 F. (2d) 218 (C.C.A. 3d). This was a suit for the refund of taxes paid on property held by a

trustee for accumulation. It was subsequently held by a court of competent jurisdiction that the accumulation provisions of the will were invalid and that the testator died intestate with respect to the residue. There seems to be little analogy between a case where the instrument in question is void upon its face and a case in which it is entirely valid and distribution is made in pursuance of its literal terms for a period of more than 30 years without question from any quarter. Furthermore, the opinion of the Circuit Court of Appeals in the *Girard Trust Company case* does not disclose passive acceptance of the state court order, but rather an independent decision of the question on the merits.[3] Even if the case is in point, which we do not concede, there would appear to be considerable doubt of the soundness of the decision, which depends upon the doctrine of "relation back." This Court has since declined to apply that doctrine in *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, and *Lucas* v. *American Code Co.*, 280 U.S. 445. In the former case one of the questions was the determination of the value of a life estate. The Court rejected the contention that the value could be fixed

[3] "Referring to this decree, the court below said, and we agree thereto, that 'this will sins against the policy of the law and the statutes enacted to enforce it is in effect admitted. That policy and these statutes nullify all provisions of wills which create perpetuities and limit accumulations to a prescribed period of time.'" 19 F. (2d) 218.

by reference to the actual life span of the tenant rather than by recourse to data as of the death of the testator when the tax liability arose.

Several very recent decisions will be referred to briefly. In *Fidelity & Columbia Trust Co.* v. *Lucas*, decided by the Circuit Court of Appeals for the Sixth Circuit on June 29, 1933, not yet reported but may be found in 333 C.C.H. 9093, the court, Judge Moorman dissenting, reversed the decision of the District Court, 52 F. (2d) 298 (W.D.Ky.). In the view of the court, the case presented a question of the proper construction of a will. The District Court rejected the taxpayer's contention that the judgment of a state probate court obtained at the instance of the trustee after the deficiency assessment was made was binding upon the Federal court when the tax question was in litigation. While the Circuit Court of Appeals reversed the judgment of the District Court, it did so as the result of an independent construction of the will, not because of any supposed binding effect of the ruling of the local court. Thus there is no conflict between that case and the present case.

We of course concede that there are certain types of questions in which the decisions of local courts of competent jurisdiction are controlling. Among cases of this character are those involving questions of the construction of state constitutions and stat-

utes, and of descent and distribution under state laws. *Pitman* v. *Commissioner,* 64 F. (2d) 740 (C.C.A. 10th), is a case of the latter sort. The significant inquiry there was the extent and character of the interest of the taxpayer in certain Indian allotments in Oklahoma. A probate court having jurisdiction entered a decree of distribution which recited that the property in question descended to and vested in the taxpayer as sole heir. This occurred before the taxable year. The case did not depend, as does the instant case, upon the law applicable to a will or other written instrument. These considerations, we submit, dispose of any apparent conflict. In *Commissioner* v. *Newport Co.* (C.C.A. 7th), decided July 8, 1933, not yet reported but see 333 C.C.H. 9111, the court denied effect to certain waivers which were executed after a local court having jurisdiction had dissolved the taxpayer's transferor. Corporations are creatures of the States which create them and when a state court of competent jurisdiction decrees that a given corporation has ceased to exist such an order would seem to finally conclude the matter.

A number of Federal tax cases have arisen presenting the question of the conclusive effect of judgments of state courts. It is believed that the controlling principles have been announced by this Court and for the most part properly applied in

the decisions of lower Federal courts. These principles seem to require the conclusion that a decision of a state court which relates to the effect to be given to a particular will or similar instrument in writing will not be deemed conclusive unless it is required by the application of a state rule of property. This seems to be particularly true where, as here, the decision of the state court is announced after the rights of the litigants in the Federal court have attached. These views, if they be sound, distinguish every case which has come to our attention.

Taxation is essentially practical and there is every practical reason for upholding the decision of the court below. If the view of the petitioner were sustained taxes regularly assessed could be invalidated years later by friendly judicial proceedings to which the Government was not a party. Proper administration of the Federal revenues requires that the taxable status of income received and enjoyed during a given year be fixed as of that time rather than as of some later time of the taxpayer's selection.

The decision below is in harmony with that of the Court of Appeals of the District of Columbia in the companion case of *Commissioner* v. *Marguerite T. Whitcomb,* decided May 22, 1833, not officially reported but found in 333 C.C.H. 8840. We respectfully invite the attention of this Court to the opinion of the majority in that case.

CONCLUSION

We submit that the case was properly decided below. There is no conflict of authority and the petition should be denied.

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AUGUST 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 246:

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to

the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

SEC. 219. (b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year. (U.S.C., Title 26, Sec. 960.)

Section 219 (b) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U.S.C.App., Title 26, Sec. 960), is the same as the corresponding subsection of the Revenue Act of 1924.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 129

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF Louise P. V. Whitcomb, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Board of Tax Appeals (R. 32–53) is reported in 22 B.T.A. 118. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 154–160) is reported in 62 F. (2d) 733. The opinion of the Court of Appeals of the District of Columbia in other cases involving the same question (R. 163–174) is reported in 65 F. (2d) 803.[1]

[1] By stipulation between the parties (R. 177–178), the decision in this case is to control the decision in eight other cases involving different tax years and other life beneficiaries of the same trust. These cases are Nos. 130 and 131 on writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit and Nos. 139–144, on writs of certiorari to the Court of Appeals of the District of Columbia.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1933. (R. 161.) On March 16, 1933, the period for filing a petition for certiorari, was extended for sixty days by order of a Justice of this Court. (R. 175.) The petition for writs of certiorari was filed June 6, 1933. The petition was granted October 9, 1933. (R. 176.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the life beneficiaries of a testamentary trust may deduct from the amounts actually distributed to them any amount for depreciation of the trust property on the ground that the amounts actually distributed were in excess of the sums properly distributable because the trustee had not reserved any amount on account of depreciation of the trust property.

2. Where the income of a testamentary trust, without deduction for depreciation of the trust property, has been distributed to the beneficiaries, whether an order of the State superior court, entered years later, directing the beneficiaries to refund a portion of the distributed income as depreciation which should have been retained by the trustee, is conclusive in determining the amount of the trust income distributable and taxable to the beneficiaries during the years when the payments were received.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, pp. 44–50.

STATEMENT

The findings of fact of the Board of Tax Appeals (R. 34–42) may be summarized as follows:

Louise P. V. Whitcomb was from sometime in 1889 until her death on June 14, 1921, the widow of A. C. Whitcomb, deceased. (R. 34.) The administrator of her estate is the petitioner here. The present case involves the taxes due on income received by her during 1921, until June 14, 1921, the date of her death.[2]

A. C. Whitcomb died in 1889, a resident of California, leaving a will which was duly admitted to probate by the Superior Court of California in and for the City and County of San Francisco. (R. 34.) The will provided, among other things, as follows (R. 34–35):

> 7th. I give to my hereinafter named Executor, Jerome Lincoln, of San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in *Trust*, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb,

[2] Of the other cases dependent on the decision in this case, Nos. 130 and 131 involve taxes of the same beneficiary for other periods, and Nos. 139–144 involve taxes of other beneficiaries of the trust created by A. C. Whitcomb's will. See Appendix B, *infra*, p. 51.

> one-third part of the interest thereon or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her; one, Adolph, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants "per stirpes" of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in Section Six (6) of this Will, having reference to said Harvard College.

The will contained no directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciation provided for. (R. 35.)

James Otis was appointed a trustee of this testamentary trust on February 23, 1896. He has acted as such trustee continuously since that date, and since the year 1905 he has been the sole trustee of the trust. (R. 35.)

The original trust estate consisted largely of cash, bonds, stocks, and notes. On February 23, 1906, the trust estate consisted of bonds, corporate stocks, cash, and promissory notes secured by mortgages, of a total value of more than $3,000,000, and certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco earthquake and fire occurred. All of the improve-

ments on the San Francisco real estate owned by the trust were destroyed by the fire, including those on the large parcel at Eighth and Market Streets, which the trust still owns and on which the Hotel Whitcomb now stands. Some time after the San Francisco fire the trustee adopted the policy of improving the real estate owned by the trust and of converting the other assets of the estate to accomplish that purpose. As a result of that policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during the years 1921 to 1926, inclusive, consisted almost entirely of improved real estate, including the Whitcomb Hotel and its furniture and equipment. The last item represented an investment of more than $2,000,000. (R. 35–36.)

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear and tear, as follows (R. 36):

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee filed fiduciary returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year the respective amounts above set forth, representing exhaustion, wear and tear sustained by the trust. The trustee, however, did not withhold from the beneficiaries to whom income payments were being made the amounts represented in the depreciation deduction, and each of these beneficiaries received her ratable share of trust income, undiminished by depreciation, during

the years involved, as well as in preceding years. (R. 37–38.)

From 1903 to 1928, inclusive, the trustee or trustees of the trust presented an annual account to the beneficiaries entitled to income payments, but did not file any account in the Superior Court of California, which has jurisdiction over the trust until its termination, for the settlement of accounts and for other purposes. (R. 38.)

On September 5, 1928, James Otis, as trustee, filed with the Superior Court in San Francisco his account accompanied by a petition for its allowance.[3] The account covered the period from February 23, 1903, to February 23, 1928. (R. 38.) The allowance and approval of the account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rochechouart, nonresident children of Charlotte A. W. Lepic, one of the life beneficiaries of the trust, who are two of the remaindermen entitled to a part of the corpus of the trust upon its termination, if they be then living. In their objections, which were filed on September 7, 1928, they alleged that the trust property had sus-

[3] This account was filed after the Court of Appeals of the District of Columbia in *Whitcomb* v. *Blair*, 25 F. (2d) 528, decided April 2, 1928, had held that one of the beneficiaries of the trust (and the petitioner here in Nos. 139, 141 and 144) was not entitled in the computation of her tax for the year 1918 to a deduction on account of the depreciation of the trust property. This decision affirmed the decision of the Board of Tax Appeals in *Marguerite T. Whitcomb* v. *Commissioner*, 5 B.T.A. 191. A similar result had previously been reached by the Board in *Appeal of Louise P. V. Whitcomb*, 4 B.T.A. 80, involving the taxes of three of the present petitioners for the years from 1917 through 1920.

tained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that this amount of $622,434.11 had been paid by the trustee to the beneficiaries of the trust entitled to the income therefrom, as income, thus impairing the trust property by that amount, and they prayed that the trustee be charged with that amount. All of the parties interested in the trust estate were notified of the filing of the account of the trustee, and of the objections, and were represented by counsel at the hearing. (R. 38–39.)

On September 19, 1928, the Superior Court of California, at San Francisco, entered two orders, one original and the other an amending order, settling the trustee's account. (R. 39–41, 136–139, 140–144.) In substance they sustain the objections of the two remaindermen and decree the repayment of the amounts claimed to have been erroneously distributed as income in the several years from 1913 to 1927. The first order directs the payment by delivery of promissory notes, payable without interest at the termination of the trust to the remaindermen as then determined. The amended order omits reference to the manner in which the several sums are to be repaid. The orders also direct the trustee to withhold annually from and after February 23, 1927, a proper amount from income as a depreciation reserve.

On January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb,

Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart, all acting through John Freuler, as attorney in fact, executed and delivered to James Otis as trustee their promissory notes in the aggregate amount of $611,734.11. (R. 42.) Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart were makers of a joint note. (R. 145.) The other notes were separate notes of the individuals concerned. (R. 146, 147, 148.) These notes bear no interest and by their terms are payable at the termination of the trust, which will be upon the death of Charlotte A. W. Lepic. A payment of $10,700 has been made to the trust by the administrator of the estate of Louise P. V. Whitcomb, the present petitioner. (R. 42.)

The life beneficiaries, in their returns of income for the years mentioned, did not include the amounts paid to them in those years by the trustee representing their proportionate share of the depreciation sustained and deducted on the fiduciary return of the estate. The respondent increased the income shown on the several returns by the proportionate share of depreciation, thus including in taxable income the full amount of the payments received by each beneficiary, and determined deficiencies in tax accordingly. (R. 42.) The Board of Tax Appeals, with six members dissenting, reversed the determination of the Commissioner. (R. 42–53, 54.) The Circuit Court

of Appeals reversed the decision of the Board and sustained the action of the Commissioner. (R. 154–160, 161.)

SUMMARY OF ARGUMENT

I

If the amounts received by the beneficiary were properly distributable to her, she was not entitled to deduct anything on account of depreciation. The petitioner concedes that the beneficiary is taxable on the full amount of the payments which were distributable to her, but contends that the amounts representing depreciation should not have been distributed, and are for that reason alone not taxable.

The petitioner's concession that the beneficiary of a trust is not entitled to a deduction from payments properly received on account of depreciation which the trust property may have sustained is required by all of the authorities which have considered the question. The concession is the more apt in the present case because the decisions in *Appeal of Louise P. V. Whitcomb*, 4 B.T.A. 80, and in *Whitcomb* v. *Blair*, 25 F. (2d) 528 (App.D.C.), were made in cases arising out of the very trust now before the Court and involved some of the beneficiaries who are now petitioners here.

The conclusion that the beneficiary of a trust is not entitled to a deduction on account of depreciation sustained by the trust property seems to be required by the decisions in *Anderson* v. *Wilson*, 289 U.S. 20, and in *Weiss* v. *Wiener*, 279 U.S. 333.

II

The entire amount of the payments made to the beneficiary in this case were distributable to her, so that even under the petitioner's construction of Section 219 (d) of the Revenue Act of 1921 (*infra*, p. 46) the deficiencies asserted in this case should be sustained. The question of the distributability of the payments in dispute is one of the proper method of allocating trust receipts between life tenants and remaindermen. It is a question of general trust law quite independent of the income tax statutes.

The correct rule, we submit, is that the trustee may deduct from income payable to life beneficiaries the entire amount of current expenses, including the cost of repairs and including, as well, the cost of renewals of personal property worn out or consumed in the administration of the trust. If the trustee deducts the cost of repairs and renewals in computing the net income payable to life beneficiaries he may not also take a deduction for depreciation. There is nothing in this record to show that the trustee has not deducted in full the cost not only of repairs but also of renewals as they were made. In fact, the inference is to the contrary.

That this is the rule properly applicable to the will here in question is evidenced by the long continued practical construction of the instrument.

Moreover we submit that income *distributable* within the meaning of Section 219 is income which was reasonably regarded by the parties as distributable at the time it was distributed. As this Court

held in *North American Oil Consolidated* v. *Burnet*, 286 U.S. 417, 424, if a taxpayer receives money "under a claim of right and without restriction as to its disposition, he has received income which he is required to return."

III

The order of the California court is not conclusive in this proceeding. The petitioner concedes that the judgment is not binding here on the basis of *res judicata*, and it is equally obvious that the decision is not binding as an *in rem* decree. It has long been settled that under these circumstances the only decisions of State courts which are conclusive upon the Federal courts are those of the highest court of the State interpreting State statutes or applying a settled rule of property. The decisions to this effect have been unbroken from *Swift* v. *Tyson*, 16 Pet. 1, to *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U.S. 518.

The true rule to be deduced from all the cases is, we submit, that when a State court of appropriate jurisdiction has determined the extent of the rights of the parties under a will or trust, and payments are thereafter actually made to the parties in accordance with that decision, then the State decision is conclusive in determining their Federal tax liability because it has as a matter of fact determined the payments which the parties have received. Where, however, as here, the State court decision did not, in fact, control the amount of the payments, it is without effect in determining Federal tax liability.

In the present case, the fact remains that in spite of the State decision the beneficiaries have received the money, and (except for one unidentified payment of $10,700) still have it.

Moreover, a consideration of the facts shown by this record makes it plain, we contend, that the order of the State court was nothing more than a friendly settlement without any real contest, and did not represent a considered adjudication of the questions involved. The judgment of the State court entered in such a proceeding is only a *pro forma* determination and certainly should not be accepted as binding upon the Federal courts with respect to past rights, if it is entitled even to that respectful consideration accorded to the decisions of State courts.

IV

The effect of the California court decree is at most to entitle the beneficiaries to a deduction from their income in the year in which they make payment pursuant to the decree. No part of the income received by the beneficiaries has been repaid to the trustee, except the sum of $10,700 repaid by the petitioner, and there is nothing to indicate for what year this repayment was made nor when it was made.

When repayments to the trustee are, in fact, made they may form a basis for a deduction in the year of repayment, but they cannot operate retroactively to render the amounts actually received any less income taxable to the beneficiaries in the year such income was received.

ARGUMENT

I

IF THE AMOUNTS RECEIVED BY THE BENEFICIARY WERE PROPERLY DISTRIBUTABLE TO HER, SHE WAS NOT ENTITLED TO DEDUCT ANYTHING ON ACCOUNT OF DEPRECIATION

The sole contention of the petitioner is that part of the sum which the beneficiary actually received from the trustee should not have been paid to her, and that under Section 219 of the Revenue Act of 1921 (*infra*, p. 44) the beneficiary is taxable only on sums which were properly *distributable* to her.

If the sums received by the beneficiary were properly distributable to her, the petitioner makes no contention that they were not taxable to her in full. The question presented is, therefore, not the same as that involved in the cases of *Helvering* v. *Falk*, No. 225, and *Reynolds* v. *Cooper*, Nos. 227-229, October Term, 1933, which are to be argued immediately following this case. In those cases it is plain that the amounts received by the beneficiaries were distributable to them in full, and the contention is that nevertheless the beneficiaries may deduct from their income amounts on account of the depletion of part of the property owned by the trust. The present petitioner concedes that the beneficiary is taxable on the full amount of the payments which were properly distributable to her, but contends that the amounts representing depreciation should not have been distributed, and are for that reason alone not taxable.

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The petitioner's concession that the beneficiary of a trust is not entitled to a deduction from payments properly received on account of depreciation which the trust property may have sustained is required by all of the authorities which have considered the question. *Roxburghe* v. *Burnet*, 58 F. (2d) 693 (App. D.C.), certiorari denied, 278 U.S. 598; *Codman* v. *Commissioner*, 50 F. (2d) 763 (C.C.A. 1st); *Hubbell* v. *Burnet*, 46 F. (2d) 446 (C.C.A. 8th), certiorari denied, 283 U.S. 840; *Kaufmann* v. *Commissioner*, 44 F. (2d) 144 (C.C.A. 3d); *Abell* v. *Tait*, 30 F. (2d) 54 (C.C.A. 4th), certiorari denied, 279 U.S. 849; *Codman* v. *Miles*, 28 F. (2d) 823 (C.C.A. 4th), certiorari denied, 278 U.S. 654; *Whitcomb* v. *Blair*, 25 F. (2d) 528 (App. D.C.); *Appeal of Louise P. V. Whitcomb*, 4 B.T.A. 80; *Roxburghe* v. *United States*, 64 C. Cls. 223, certiorari denied, 278 U.S. 598. Cf. *Baltzell* v. *Mitchell*, 3 F. (2d) 428 (C.C.A. 1st), certiorari denied, 268 U.S. 690, involving a capital loss. This conclusion was also reached in the decisions of the two courts below in the present case. *Commissioner* v. *Freuler*, 62 F. (2d) 733 (R. 154, 159); *Burnet* v. *Whitcomb*, 65 F. (2d) 803 (R. 163, 168–170).

The concession is the more apt in the present case because the decisions in *Appeal of Louise P. V. Whitcomb*, 4 B.T.A. 80, *supra*, and in *Whitcomb* v. *Blair*, 25 F. (2d) 528, *supra*, were made in cases arising out of the very trust now before the Court; the former case involved the very beneficiary whose administrator is now petitioner in this Court, to-

gether with two of the other beneficiaries, while the latter case involved the taxpayer who is petitioner in Nos. 139, 141, and 144 (three of the cases controlled by the present decision), with respect to taxes for an earlier year.

As is pointed out in the Government's brief in *Helvering* v. *Falk*, No. 225, the conclusion that the beneficiary of a trust is not entitled to a deduction on account of depreciation sustained by the trust property seems to be required by the decisions of this Court in *Anderson* v. *Wilson*, 289 U.S. 20, and in *Weiss* v. *Wiener*, 279 U.S. 333. In the *Wilson* case, this Court, citing several of the above cases with approval (p. 27), held that the beneficiary of a trust was not entitled to a deduction on account of capital losses sustained on the sale of part of the trust property, even though the beneficiary was ultimately entitled to receive the proceeds of the sale. There seems to be no basis for a distinction in this respect between losses resulting from sales and losses resulting from depreciation. In *Weiss* v. *Wiener*, it was held that a lessee was not entitled to a deduction for depreciation of buildings on the leased property because the depreciation did not represent a loss of the lessee's capital. If a lessee is not entitled to a deduction on account of the depreciation of leased property it would seem to follow necessarily that the life beneficiary of a trust is not entitled to such a deduction.

II

APART FROM THE EFFECT OF THE DECREE OF THE CALIFORNIA COURT, THE PETITIONER HAS NOT SHOWN THAT ALL OF THE INCOME PAID TO THE BENEFICIARY WAS NOT PROPERLY DISTRIBUTABLE TO HER

Section 219 (d) of the Revenue Act of 1921 (*infra*, p. 46) provides that where income of a trust is to be distributed to the beneficiaries periodically,

> the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, * * *.

The petitioner's position is that under a literal reading of this statute the beneficiary was taxable only on so much of the income of the trust as was *distributable* to her. We contend that the entire amount of the payments made to the beneficiary in this case were distributable to her, so that even if the petitioner's construction of the statute be correct, the deficiencies asserted in this case should be sustained.

In contending that the amount in question here was not distributable to the beneficiary, the petitioner relies both on the order of the California superior court and on the ground that as a matter of general law, the trustee should have withheld a reserve for depreciation. The question of the effect of the California court order is discussed in Point III (*infra*, pp. 27–40). Apart from the effect of that order,

we contend here that the petitioner has not shown that all of the income paid to the beneficiary was not properly distributable to her.

It is to be noted that the question thus presented is not how the trustees should have made out their income tax returns, nor whether they or anybody else was entitled to a deduction for depreciation in computing income taxes. The question is one of the proper method of allocating trust receipts between life tenants and remaindermen. It is a question of general trusts law quite independent of the income tax statutes.

The correct rule, we submit, is that a trustee conducting a business may deduct from income payable to life beneficiaries the entire amount of current expenses, including the cost of repairs and including as well the cost of renewals of personal property worn out or consumed in the administration of the trust. Of course, if he deducts the cost of repairs and renewals in computing the net income payable to life beneficiaries, he may not also take a deduction for depreciation. *There is nothing in this record to show that the trustee has not deducted in full the cost not only of repairs but also of renewals as they were made.* In fact, the inference is to the contrary.

The only information in the record as to how the amounts payable to the beneficiaries were calculated is that contained in the account filed by the trustee with the Superior Court on September 5, 1928 (R. 110–125), together with the statement in the findings (R. 38) that the trustee did not withhold from the beneficiaries any amounts for depreciation.

The account of the trustee, however, contains for each year only two items, one for "Income received" and another for "Expenses paid." There is nowhere any indication of the individual items going to make up the "Expenses paid." Since the trustee was continuously and successfully operating the trust property, including a hotel which, with its furniture and equipment, represented an investment of more than $2,000,000 (R. 36), it would seem to follow as a necessary conclusion that the trustee must have paid out each year large sums not only for repairs of the trust property but also for renewals. As the sheets and pillows and rugs and furniture and glassware and kitchen utensils used in the operation of the hotel were worn out or broken or became unserviceable, they must have been replaced, and it seems a fair inference that the cost of these replacements must have been included each year in the item of "Expenses paid," and the life beneficiaries' income reduced accordingly. In any event, there is nothing whatever in the record to show that payments on this account were not deducted in computing the sum payable to the beneficiary in this case.[4]

The distinction for which we contend between the allowance of a gross sum for depreciation on the one

[4] It might be contended that this argument is applicable only to the personal property used by the trustee in the operation of the hotel, and that it does not apply to the hotel building itself. But the depreciation which the petitioner claims should have been deducted from the beneficiary's interest covers furniture and equipment as well as the building, and the record furnishes no basis for allocating it in part to personal property and in part to the building. The

hand, and current payments by the trustee for repairs and renewals on the other hand, is plainly illustrated by *Matter of Jones*, 103 N.Y. 621, one of the cases cited by the petitioner himself (Br. 36) in support of his position that the trustee should withhold from income payable to life beneficiaries a sum equivalent to the depreciation of the trust property. Despite the petitioner's statement to the contrary (Br. 36) that case did not involve depreciation of real estate. No one there contended that the trustee should withhold from the income payable to the life tenants a gross sum for depreciation. Instead, it appeared (pp. 623–624) that "Various appliances and articles which had been worn out in the conduct of the business, as well as horses which had died, were replaced by the executors, and the amount paid therefor charged against the life tenants. Certain items for repairs were also charged against the life tenants." The question presented, as stated by the court (p. 624) was whether these items "were proper charges against the income." The court held that they were. It said (p. 624):

> While a case might arise where a large expenditure, as, for instance, the erection of additional buildings, might be such an improvement of the real estate as to become an addition

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burden of proof is on the petitioner (*Reinecke* v. *Spaulding*, 280 U.S. 227), and even if it should be concluded that the trustee should have deducted something on account of the depreciation of the building in addition to the expenses which he may have incurred for its repair, the record does not show the amount of depreciation sustained by the building alone.

> to the capital employed, yet ordinary expenditures for repairs or improvement would not be embraced within any such rule. So, also, in reference to the wearing out, loss of or depreciation of personal property, it cannot well be claimed that moneys expended to replace the same should not be deducted from the income received or profits realized.

This decision, we contend, represents the correct view. The trustee may deduct from the income payable to life beneficiaries sums actually expended for repairs and for replacements. As has been pointed out, it does not appear that the trustee has not made such deductions here. If he has made deductions of expenses actually incurred for such items, it must follow necessarily that he may not deduct an additional sum in gross on account of depreciation.

The general rule of trust law, that a trustee may not withhold from income payable to a life beneficiary a sum in gross on account of the depreciation of the trust property, is supported by the decisions which have held that the life beneficiary of a trust may not take a deduction on account of the depreciation of the trust property. Several of these cases were based on the ground that as a matter of the law of trusts the net income of the trust was distributable by the trustee to the beneficiary without any deduction on account of depreciation. *Hubbell* v. *Burnet*, 46 F. (2d) 446, 450 (C.C.A. 8th), certiorari denied, 283 U.S. 840; *Whitcomb* v. *Blair*, 25 F. (2d) 528, 529 (App.D.C.).[5] Cf. *Roxburghe* v. *United States*, 64 C.Cls.

[5] In fact, the petitioner himself contends (Br. 20–21) that the court in *Whitcomb* v. *Blair* based its determination that

223, certiorari denied, 278 U.S. 598. The same result is also supported by other decisions not involving taxes. In *Smith* v. *Keteltas*, 62 App. Div. 174, it was held (p. 181) that it was not the trustee's duty to "withhold from the life tenant moneys out of the income for the purpose, not of repair, but of erecting whole new buildings when those already upon the premises, should be reason of lapse of time, become incapable of further repair." See also *Matter of Chapman*, 32 Misc. 187, affirmed, 59 App. Div. 624, affirmed, 167 N.Y. 619.

The decision in *In re Crabtree*, 106 Law Times Rep. (N.S.) 49, upon which the petitioner relies (Br. 36), is plainly distinguishable. It did not involve real property, and accordingly it does not hold that a trustee should deduct from the income payable to a life beneficiary any sum on account of the depreciation of a building.[6] The question there

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the payments reserved by the taxpayer were taxable in full on the ground that these amounts were properly *distributable*. See also the similar argument at p. 23 of the petitioner's brief.

This question was decided in *Whitcomb* v. *Blair*, not assumed. So far as the appellant in that case (the petitioner here in Nos. 139, 141, and 144) is concerned, that decision would seem to be *res judicata* of this issue, even though not pleaded. *Southern Pacific Railroad* v. *United States*, 168 U.S. 1.

[6] Similarly, in *Matter of Housman*, 4 Dem. (N.Y.) 404, relied on by the petitioner (Br. 36), the only depreciation allowed was with respect to household furniture. Although the trust property included a house, no one contended that depreciation should be deducted on account of the house. Moreover, it appears from the report that no charge had been made against the life tenant's income on account of renewals of the furniture.

arose only with respect to machinery, some of which, although kept in repair, had become obsolete. Moreover, the only charges for repairs or renewals which had been made against income were (p. 50) for "beltings, brushes, perishable rollers, and other articles which required constant replacing." No charges for replacement of the machinery itself had been made. In the present case, it does not appear that any item has become obsolete, nor does it appear that the life tenants have not already been charged in full for repairs and renewals.

The petitioner does not cite any case from any jurisdiction holding that a trustee may properly withhold from the income of a life beneficiary of a trust a gross sum on account of the depreciation of a building included in the trust property. We are confident that there are no such cases. Although a trustee may properly expend from the gross income of the trust all sums that are necessary to keep the buildings in tenantable repair, depreciation is not a charge which looks toward repair. It is rather a provision for the replacement of the buildings when they have become obsolete or useless. It has long been settled that the cost of permanent replacements and improvements of real property are not chargeable against the income of the life beneficiary of a trust. Restatement of Trusts, Section 225, Comment *i*; *Abell* v. *Brady*, 79 Md. 94, 101; *Greene* v. *Greene*, 19 R.I. 619, 625–626. Depreciation (after all repairs have been made) is a proper charge to the capital of the trust, just as an increase in the market value of land held by the trust results to the benefit

of the capital interests. Land and buildings may, despite the lapse of time, greatly increase in value, and this increase goes to the remainderman.[7] Similarly, if the trust property is invested in land and buildings, the risk of loss through depreciation (after all repairs have been made) must be borne by the remainderman. This, we submit, is a correct statement of the law of trusts.

Finally, we are not confined to an investigation of the law on this subject even though that law be clear. It is, of course, well settled that the long continued practical construction of an instrument will be controlling in the courts when there is any doubt or ambiguity in the instrument itself. *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 118. In this case the instrument was the will of the testator, and the trustee was the person primarily charged with carrying it out according to its terms. In fulfilling this duty, the trustee for a period beginning sometime after 1906 and extending to 1928, or more than twenty years, distributed the income of the trust to the life beneficiaries without withholding any sum for depreciation. During all of this period accounts were rendered annually in writing to the beneficiaries and were accepted by them. (R. 128.) Moreover, the failure to withhold depreciation was not a mere matter of oversight on the part of the trustee. His

[7] The remaindermen in this case have benefited from such gains. The trustee's answer to the remaindermen's objection to his account states that "large gains and profits have been made through sales and other dealings in bonds and real property of the estate, and that said profits have been applied in increasing the capital of said trust estate." (R. 134.)

attention was specifically directed to the question at least as early as 1917, for, in that year and in each succeeding year, the trustee included a deduction on account of depreciation in his fiduciary returns of the income of the trust estate. See *Appeal of Louise P. V. Whitcomb*, 4 B.T.A. 80, 82: R. 37–38. In the light of this practical construction, long continued, unbroken, and unchallenged until after the decision in *Whitcomb* v. *Blair*, 25 F. (2d) 528, *supra*, had shown possible advantage from a challenge, there is small basis for the contention that the trustee should have made a deduction for depreciation from the income of the life beneficiaries.

In the preceding argument we have assumed with the petitioner that the income *distributable* within the meaning of Section 219 of the Revenue Act of 1921 is the income which may ultimately be determined to be distributable regardless of the time when that ultimate determination is made. We contend, however, that this construction of the word is too broad. The Revenue Acts are designed to raise an annual revenue, and Congress obviously did not intend that the determination of the facts necessary to the computation of the tax for a particular year, might be postponed indefinitely and affected by events occurring long after that year.

We submit that income distributable within the meaning of Section 219 is income which was reasonably regarded by the parties as distributable at the

time it was distributed.[8] The income in question here was plainly so regarded. It was subject to the unfettered control and command of each beneficiary as soon as it was received. The liability for the tax then attached and should not be affected, we submit, by events occurring years later. In *North American Oil Consolidated* v. *Burnet*, 286 U.S. 417, 424, this Court held:

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent. * * * [9]

Even if it should be properly decided that the amounts actually distributed were not in fact distributable, the situation is not distinguishable, we submit, from that in *Ford* v. *Commissioner*, 51 F. (2d) 206, certiorari denied, 284 U.S. 666. There the

[8] This is not an argument that all items distributed are taxable. It is an argument as to the proper construction of the word "distributable." There is obviously no danger in this of double taxation, despite the petitioner's argument to the contrary. (Br. 23–24.) The same test applies to both parties, and whatever is "distributable" to the beneficiaries may be deducted by the trustee.

[9] The petitioner argues (Br. 25) that the *North American Oil Consolidated* case is not in point because it did not involve Section 219. But this does not seem to be a sufficient basis of distinction. The case does hold that taxability under the income tax laws is to be determined as of the date of receipt, and that taxability at that time is not affected by subsequent events.

executors of an estate in 1920 distributed certain stocks to legatees who in 1922 received dividends thereon. In 1926, the appropriate probate court held that the distribution had been premature and ordered the legatees to account for the principal and income from the stock from the date of distribution to December 31, 1922. In rejecting the contention that the dividends were not taxable income to the legatees when received in 1922, the court said (p. 207):

> We think these 1922 dividends were taxable income received by the petitioners during that year. Certainly they then had complete legal title to the stock and to the dividends. If taxes regularly assessed could be invalidated, an indefinite number of years later, by a consent judgment purporting to vacate the title of the taxpayer to the fund he had reported as income, the necessary system of tax collection would be much impaired. The true normal criterion to be applied in this class of case is the actual receipt and retention during the year in question of what was then considered to be income, not whether the taxpayer exposed himself to possible personal liability.

See also *Wear* v. *Commissioner*, 65 F. (2d) 665, 668 (C.C.A. 3d); *United States* v. *Mahoning Coal R.R. Co.*, 51 F. (2d) 208 (C. C. A. 6th), certiorari denied, 285 U. S. 559; *Jackson* v. *Smietanka*, 272 Fed. 970 (C.C.A. 7th). Compare Point IV of this brief (*infra*, pp. 40–43).

This construction of the statute is also supported, we submit, by the many cases holding that a tax-

payer may not defer reporting income actually received under a claim of right on the ground that claims are being asserted the outcome of which may later deprive him of it, or on the ground that there are limitations or potential liabilities which may affect his right to dispose of the income. *Commissioner* v. *Brooklyn Union Gas Co.*, 62 F. (2d) 505 (C.C.A. 2d); *Board* v. *Commissioner*, 51 F. (2d) 73 (C.C.A. 6th), certiorari denied, 284 U.S. 658; *Cleveland Ry. Co.* v. *Commissioner*, 36 F. (2d) 347 (C.C.A. 6th), certiorari denied, 281 U.S. 743; *Newman* v. *Commissioner*, 40 F. (2d) 225 (C.C.A. 10th), certiorari denied, 282 U.S. 858; *Rodrigues* v. *Edwards*, 40 F. (2d) 408 (C.C.A. 2d); *Vang* v. *Lewellyn*, 35 F. (2d) 283 (C.C.A. 3d).

III

THE ORDER OF THE CALIFORNIA COURT IS NOT CONCLUSIVE IN THIS PROCEEDING

The petitioner's argument is based primarily upon the effect which he contends must be given to the order of the California Superior Court entered on September 19, 1928. The authorities to the effect that that decision is not conclusive appear to be so clear as to make reference to them hardly necessary. But the petitioner argues so strenuously that the State court's order is conclusive that we are impelled to advance some of the many authorities to the contrary.

The petitioner concedes, of course, that the judgment is not binding here on the basis of *res judicata*

(Br. 28), since the United States was not and could not have been a party to the proceeding in which it was entered. It is equally obvious that the decision is not binding here as an *in rem* decree; there was no *res*, no question of title to specific items of property. The only effect, therefore, which can be given to the order is that resulting from the consideration and respect which is always accorded to the decisions of State courts. It has long been settled that the only decisions of State courts which are conclusive upon the Federal courts are those of the highest court of the State interpreting State statutes or applying a settled rule of property.

The petitioner relies on Section 905 of the Revised Statutes (U.S.C., Title 28, Sec. 687) and says (Br. 31) that the "argument of the Commissioner and the holding of the court below fly in the teeth" of this statute. Apart from the fact that this statute has no application except where a judgment can be relied on as *res judicata* (*Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111; *Knights of Pythias* v. *Meyer*, 265 U.S. 30), it seems obvious that the petitioner is only attempting to resurrect an argument that has been dead for nearly a century. As long ago as *Swift* v. *Tyson*, 16 Pet. 1, this Court rejected a similar contention made with respect to the 34th Section of the Judiciary Act of 1789, c. 20, 1 Stat. 73, 92, providing that the laws of the several States should be regarded as rules of decision in trials at common law in the Federal courts in cases where they applied.

In *Lane* v. *Vick*, 3 How. 463, the Court, citing *Swift* v. *Tyson*, construed a will for itself in determining the rights of beneficiaries, although the State court in another proceeding had adopted a different construction. This Court said (p. 476):

> With the greatest respect, it may be proper to say, that this court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes.
>
> Where, as in the case of *Jackson* v. *Chew*, 12 Wheat., 167, the construction of a will had been settled by the highest courts of the state, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property. The construction of a statute by the Supreme Court of a state is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. *But the mere construction of a will by a state court does not, as the construction of a statute of the state, constitute a rule of decision, for the courts of the United States.* (Italics ours.)

The rules thus announced were approved and applied in many cases, including *Oates* v. *National Bank*, 100 U.S. 239, 246, *Railroad Co.* v. *National Bank*, 102 U.S. 14, 29, 55, *Burgess* v. *Seligman*, 107 U.S. 20, 33–34, and in *Bucher* v. *Cheshire Railroad Co.*, 125 U.S. 555. In *Barber* v. *Pittsburgh, Fort Wayne and Chicago Ry. Co.*, 166 U.S. 83, the con-

troversy related to the construction of a will which had previously been interpreted by the Supreme Court of Pennsylvania. This Court stated the question presented in these words (p. 99):

> The question, whether the opinion of the Supreme Court of the State in the former action is conclusive evidence of the law of Pennsylvania in a court of the United States depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise.

The court then considered the decision of the Pennsylvania Court, held that it did not represent a settled rule of property in that State, and concluded that it was not binding in the Federal Court.

The principles of these cases were reviewed in detail in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349. And, finally, in *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U.S. 518, the same cases were relied on by this Court in upholding the validity of a contract although the state court had held such contracts invalid. The Court pointed out that the applicable rule was that in the absence of a local statute the Federal courts are free to exercise their independent judgment in the construction of wills, commercial papers, insurance policies, and on other questions of general law.

The principle established by these cases would seem to require the conclusion that the order of the state court in this case is not conclusive upon this Court

and the court below in determining the distributable shares of the beneficiaries of the trust involved. No question of the construction and application of a state statute was involved, nor can the order be considered an application of a settled rule of property in the State. There is nothing to show that by repeated decisions of the highest court of California, long acquiesced in, there is an established rule of property in that State requiring the trustee of a testamentary trust, who is directed to distribute the income periodically to named beneficiaries in designated shares, to set aside any portion of such income as a reserve for depreciation of the trust property. Not only are there no such decisions in California, but there do not appear to be any such decisions in any court so far as real property is concerned. The decision in *In re Gartenlaub*, 185 Cal. 648, upon which the petitioner so strongly relies, does not establish any such rule. That case deals with the specialized question whether a trustee who purchases bonds at a premium should amortize that premium out of trust income. That is a question which has been passed upon in many cases, but a decision by a state court on that question falls far short of establishing a settled rule that the trustee should withhold a gross sum on account of the depreciation of trust property.

The cases relied on by the petitioner are, we submit, distinguishable. Several of them [10] involved State

[10] Including *Keith* v. *Johnson*, 271 U.S. 1; *United States* v. *Kombst*, 286 U.S. 424; *Michigan* v. *Michigan Trust Co.*, 286 U.S. 334, and *Pitman* v. *Commissioner*, 64 F. (2d) 740 (C.C.A. 10th).

decisions construing and applying a State statute, a field in which State decisions have always been regarded as conclusive. Others[11] involved an *in rem* decree.

In *Uterhart* v. *United States*, 240 U.S. 598, there had been a decision of the State court as to the meaning and effect of a will at the time of probate and the question before this Court was the application of the Federal legacy tax to the interest so established. There was no suggestion that the decision of the State court did not represent a considered judgment on the question. The United States admitted the State decree to be binding (240 U.S. 603) and although the opinion does not expressly say so, it is not unlikely that the State decree there was an application of a settled rule of property in the State. In the present case, the State order was entered after the taxable years involved, nearly forty years after the probate of the will, after the trust income had been distributed regularly for many years without any reservation for depreciation, and after the will had been construed by Federal tribunals and taxes had been imposed for earlier years in accordance with that construction.

In *Commissioner* v. *Field*, 42 F. (2d) 820 (C.C.A. 2d), the taxpayer was the beneficiary of a trust created by the will of his grandfather. Prior to the taxable year involved (see 15 B.T.A. 718), a decree

[11] *Atwood* v. *Rhode Island Hospital Trust Co.*, 34 F. (2d) 18 (C.C.A. 1st); *Boal* v. *Metropolitan Museum of Art*, 19 F. (2d) 454 (C.C.A. 2d). "A proceeding for the probate of a will is a proceeding in rem * * *." 2 Freeman, *Judgments* (5th ed.) Sec. 811.

had been entered by a State court holding that the taxpayer received his interest free of any restraints on alienation. Thereafter the taxpayer assigned a portion of his interest, and he did not in fact receive the income from this portion in the year in question. The question presented in the Federal court was whether the taxpayer was nevertheless taxable on this assigned income. In the present case, the beneficiaries received and enjoyed the income and the decree of the State court was not obtained until after the tax controversy had arisen many years later. In *Farwell* v. *Commissioner*, 38 F. (2d) 791 (C.C.A. 2d), the payments in question had actually been made and approved by the State court long before the Federal tax question arose.

McCaughn v. *Girard Trust Co.*, 19 F. (2d) 218 (C.C.A. 3d), involved a provision for accumulation which was invalid on its face. The State court decision related to the very existence of the trust and not as here to a mere matter of the administration of a trust that had been in existence nearly forty years. The opinion of the Circuit Court of Appeals does not disclose passive acceptance of the State court order but rather an independent decision of the question on the merits.

The true rule to be deduced from all the cases is, we submit, that when a State court of appropriate jurisdiction has determined the extent of the rights of the parties under a will or a trust, and payments are thereafter actually made to the parties in accordance with that decision, then the State decision is conclusive in determining their Federal tax liability, not

as an adjudication or determination of the law, but because it has as a matter of fact determined the payments which the parties have received. Where, however, as here, the State court decision did not in fact control the amount of the payments, because it was not made until many years later, the State court decision is without effect in determining Federal tax liability because it did not in fact determine the payments actually made. And this is especially true where the State court decision is in effect a mere declaration which has never been complied with by actual payment, and the parties show plainly that they do not intend that it should be so complied with. The fact remains that the beneficiaries here received the money, and (except for the one unidentified payment of $10,700) still have it.

In the preceding argument it has been assumed that the decision of the State court in this case represented an actual adjudication of the question involved. The inference that it was not such an adjudication, however, seems irresistible.[12] A consideration of the facts shown by this record makes it plain, we contend, that the order of the State court was nothing more than a friendly settlement without any real contest, and requires the inference that the primary, if not the sole, object of the proceeding was to establish a basis for a deduction of depreciation

[12] This, of course, is not a contention that the State court order was invalid or improper. The argument relates only to the effect to be given the order.

for Federal income tax purposes. There was, of course, practically, such a community of interests that the apportionment of depreciation was largely a matter of indifference except as it might affect Federal tax liability. These facts may also be referred to:

1. The "account" of the trustee—the first he had rendered in more than twenty-five years—was filed five months after the decision of the Court of Appeals of the District of Columbia in *Whitcomb* v. *Blair*, 25 F. (2d) 528, *supra*, and while the present proceedings had been pending before the Board for more than two years.

2. The "account" contains no information whatever except a statement of the aggregate of receipts and expenditures for each year. (R. 110–125.)

3. The answer of the remaindermen was filed two days after the account was filed (R. 129, 136), although these remaindermen were resident in France.

4. The decree absolved the trustee from all liability (R. 142–143), although it is well settled that good faith and advice of counsel are no defense to a trustee who pays trust property to the wrong beneficiary. See Restatement of Trusts, Section 218; *Bate* v. *Hooper*, 5 DeG. M. & G. 338.

5. Although the "account" is for fiscal years ending February 23, the decree determines depreciation for calendar years.

6. No allowance was made for the statute of limitations which would apparently be

applicable to overpayments of money such as were said to have been made here. 2 Perry, Trusts (7th ed.), Sec. 855.

7. The decree directs repayment of the amounts representing depreciation only for the years beginning with 1913, *the income tax years.* The record shows plainly that the trust contained depreciable property prior to 1913. (R. 68, 69, 70.)

8. The amount of depreciation determined in the order is precisely the amount claimed by the trustee in his returns and claimed by the beneficiaries in the several proceedings before the Board.

9. The decree has never been complied with in terms.

10. The notes given in purported compliance with the decree (R. 145–148) are payable without interest either for the period before or following the decree. The amount of the note signed by each beneficiary is not even approximately the amount he was held to have been overpaid.

11. The notes are not payable until "the termination of said trust," at which time they will in large part be payable by mere bookkeeping transactions out of the remaindermen's interests.

12. The largest of the notes is signed jointly by two of the remaindermen and their mother. These two remaindermen have never received a cent of the trust income. They were in no way liable to restore any sum to the trust, and the only effect of their signature on the notes is that when their mother dies and

> the trust terminates they will become the beneficial payees of the note (unless they both die before their mother).[13]

The inference from these facts that the court decree was a friendly arrangement and not a considered judgment seems inescapable. The judgment of the State court entered in such a proceeding is only a *pro forma* determination and certainly should not be accepted as binding upon the Federal courts with respect to past rights, if it is entitled even to that respectful consideration accorded to the decisions of State courts.

In *Fidelity & Columbia Trust Co.* v. *Lucas*, 52 F. (2d) 298 (W.D.Ky.), the taxpayer's contention was similar to that made here. The court concluded (p. 301) that "the judgment relied upon must be regarded as nothing more than an agreed judgment." It then said:

> Under these circumstances it would shock one's sense of justice to hold that the government is concluded by the state court judgment. Furthermore, it is well settled that a decision of a state court, establishing a local rule of property or, construing a state statute or a contract made after the rights of a litigant in a federal court suit had accrued, and in a case to which he was not a party, is not binding upon the federal court. I know

[13] It seems not unlikely that the parties had in mind the decision of the Supreme Court of California in *Gordon* v. *Wansey*, 21 Cal. 77, that a note which becomes payable to one of its joint makers is extinguished. To the same effect is *Snell* v. *Davis*, 149 Ill. App. 391; 1 Williston, *Contracts*, p. 630.

> of no reason why this rule should not apply to the construction of wills. See *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, and authorities there cited.
>
> I therefore conclude that I am not only free, but it is my duty, to make my own construction of the will in this case.

The decision in that case was reversed by the Circuit Court of Appeals for the Sixth Circuit (*Fidelity & Columbia Trust Co.* v. *Lucas*, 66 F. (2d) 116), not upon the ground that the judgment of the State court was binding, but because the Circuit Court of Appeals agreed with the construction placed upon the will by the State court.

The petitioner raises one further point with respect to the court decree. He contends (Br. 26) that it is controlling because Congress has expressly made it controlling by directing in Section 219 (d) of the Revenue Act of 1921 (*infra*, p. 46) that each beneficiary shall include in his return of income the amounts which were distributable to him "pursuant to the instrument or order governing the distribution." The petitioner contends that the order of the California court was the "order governing the distribution" and that, therefore, Congress has expressly directed that it shall be controlling.

In the first place, it seems obvious that the order in question could not have been the "order governing the distribution" when the distribution was made many years before the order existed. However that

may be, we submit that the words "order governing the distribution" do not have the significance attributed to them by the petitioner. The provisions of Section 219 (d) expressly refer to those of Section 219 (a) (4) (*infra*, p. 45), in which Congress directed that the income tax provision should be applicable to two different situations: (1) income distributed periodically to the beneficiaries of estates or trusts, and (2) "income collected by a guardian of an infant to be held or distributed as the court may direct." This separation of the two classes of income and recognition of the two types or methods of distribution are maintained throughout the other subdivisions of the same section of the statute (subdivisions (c), (d) and (e) of Section 219). From this it is quite clear that the reference in the statute to the "order governing the distribution" applies to income collected by a guardian for an infant and has no application to the income of a trust which is distributed periodically to the beneficiaries. With respect to the latter type of income, the statute makes the "instrument" the governing criterion.

The provisions of Section 219 (b) of the Revenue Acts of 1924 and 1926 (*infra*, pp. 48–50), where the reference to court orders is confined solely to distributions by a guardian to an infant, plainly shows that Congress contemplated that the distribution of trust income was governed by the trust instrument. The change in the language of the later Acts was solely

for the purpose of clarifying the existing law. See Senate Report No. 398, 68th Cong., 1st Sess., p. 25; House Report No. 179, 68th Cong., 1st Sess., p. 21. These later Acts are involved in some of the other cases whose decision depends on that made in this case.

IV

THE EFFECT OF THE CALIFORNIA COURT DECREE IS AT MOST TO ENTITLE THE BENEFICIARIES TO A DEDUCTION FROM THEIR INCOME IN THE YEAR IN WHICH THEY MAKE PAYMENT PURSUANT TO THE DECREE

The petitioner's decedent, as well as the other beneficiaries, received and retained the entire amount of the income here in question during the taxable years involved. When it was received it was subject to no lien or other charge. The beneficiaries were free to use it and spend it as they wished. The beneficiaries made their tax returns on the basis of cash receipts and disbursements (at least we may assume so, as the record does not show the contrary). We submit that the amounts so received were income in full when they were received, and that the effect of the California court decree is at most to entitle the beneficiaries to a deduction in the year in which any payments are actually made pursuant to the decree.

No part of the income so received by the beneficiaries has been repaid to the trustee, except the sum of $10,700 repaid by the petitioner, and there is nothing to indicate for what year this repayment was

made nor when it was made.[14] This payment represents approximately 7 percent of the amount due from the petitioner and his decedent under the decree. No notes or other obligations evidence even a simulated intention to repay the other 93 percent. We submit that at least until the taxpayer has actually repaid the sums in question he is in no position to complain that he was subjected to taxation on the payments made to him when they were received.

When repayments to the trustee are in fact made they may form a basis for a deduction in the year of repayment,[15] but they cannot operate retroactively

[14] The total amount of depreciation set forth in the Superior Court decree is $622,434.11. (R. 40.) Calculation shows that the amount of this depreciation properly attributable to the petitioner and his decedent is $151,553.63, of which over $100,000 is attributable to the period before 1921. It would seem proper to apply the payment of $10,700 against the earlier years first. It would not have covered the amount due under the order of the Superior Court for the years 1913 and 1914.

[15] The petitioner cites *Pyle* v. *Commissioner*, 16 B.T.A. 218, as an authority for the proposition that the beneficiaries may not deduct repayments to the trustee in the year in which they are made. In that case the trustee withheld from the beneficiary in 1921 a sum necessary to make up for an overpayment in 1920. The only question which the Board considered was whether the full sum was "distributable" in 1921. The Board apparently overlooked the question that, assuming that the full sum was "distributable" in 1921, the beneficiary might be entitled to a deduction.

We agree with the petitioner that the repayment would not be within the deduction for "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business", allowed by Section 214 (a) (1) of the 1921 Act. The petitioner does not, however, refer to the provision of Section 214 (a) (5) allowing a deduction

to render the amounts actually received any less income taxable to the beneficiaries in the year such income was received. *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359.

In *Chicago, R. I. & P. Ry. Co.* v. *Commissioner*, 47 F. (2d) 990 (C.C.A. 7th), certiorari denied, 284 U.S. 618, it was contended that an item was not properly taxable as income because the taxpayer might thereafter have to refund portions of it. The court, however, rejected the argument, saying (p. 992):

> In case petitioner were subsequently required to pay any of these sums, it would be entitled to a deduction for the amount thus paid in the year it was paid.

To the same effect is *Charleston & W. C. Ry. Co.* v. *Burnet*, 50 F. (2d) 342, 343 (App.D.C.). See also *North American Oil Consolidated* v. *Burnet*, 286 U.S. 417, *Ford* v. *Commissioner*, 51 F. (2d) 206, certiorari denied, 284 U.S. 666, and the other cases cited and discussed at pp. 25–27, *supra*.

Whether the beneficiaries in this case will or will not be entitled to a deduction if and when they make

---

for "Losses sustained during the taxable year * * *, if incurred in any transaction entered into for profit, although not connected with the trade or business." The receipt of income from a testamentary trust would seem to be as much a transaction entered into for profit as is the receipt of a bequest or devise of property. When such property is sold for less than its value at the time of the bequest or devise, it has been held that there is a loss which may be deducted under Section 214 (a) (5). *Appeal of Williams*, 1 B.T.A. 1101.

repayments to the trustee does not, however, seem to be material here. Our contention is that since the payments made to the beneficiaries were received by them without restriction, they were taxable when received, and the greatest effect that can be given to the subsequent court decree is to establish a basis for a deduction if Congress has authorized such a deduction.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
SEWALL KEY,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

NOVEMBER, 1933.

APPENDIX A

STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 239–240, 246–247, provides in part as follows:

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *

* * * * *

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913;

* * * * *

ESTATES AND TRUSTS

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) there shall also be allowed as a deduction, without limitation, any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of section 214. In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be

deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then three shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

(e) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that there shall be allowed as an additional deduction in computing the net income

of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary.

(f) A trust created by an employer as a part of a stock bonus or profit-sharing plan for the exclusive benefit of some or all of his employees, to which contributions are made by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, shall not be taxable under this section, but the amount actually distributed or made available to any distributee shall be taxable to him in the year in which so distributed or made available to the extent that it exceeds the amounts paid in by him. Such distributees shall for the purpose of the normal tax be allowed as credits that part of the amount so distributed or made available as represents the items specified in subdivisions (a) and (b) of section 216.

In the Revenue Act of 1924, c. 234, 43 Stat. 253, 269–270, Sections 214(a)(5) and 214(a)(8) (U.S.C., Title 26, Sec. 955), are substantially the same as Sections 214(a)(5) and 214(a)(8) of the Revenue Act of 1921 set out above.

Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 275–277 (U.S.C., Title 26, Sec. 960), provides in part as follows:

ESTATES AND TRUSTS

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

(1) There shall be allowed as a deduction (in lieu of the deduction authorized by paragraph (10) of subdivision (a) of section 214) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214, or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to

children or animals or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

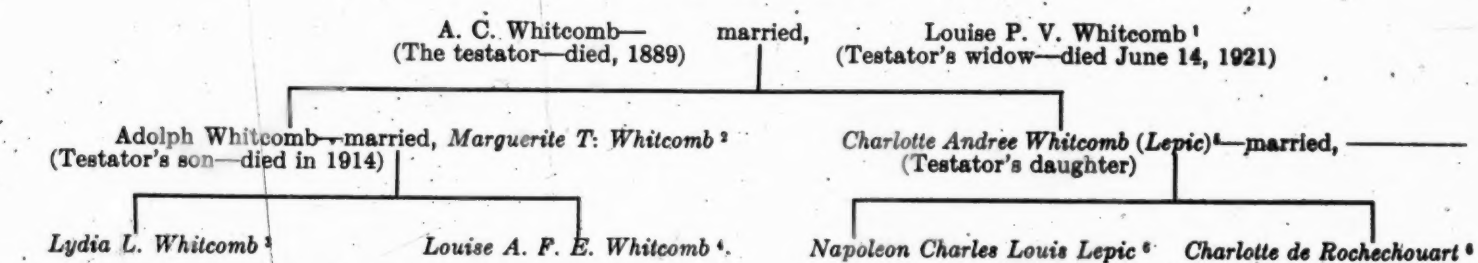
(3) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

(c) For the purpose of the normal tax the estate or trust shall be allowed the same credit as is allowed to a single person under subdivision (c) of section 216, and, if no part of the income of the estate or trust is included in computing the net income of any legatee,

heir, or beneficiary, then in addition the same credits as are allowed by subdivisions (a) and (b) of section 216.

Section 214 and Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 26–28, 32–34 (U.S.C.App., Title 26, Secs. 955, 960) are substantially the same as the corresponding provisions of the Revenue Act of 1924.

APPENDIX B



[1] The administrator of the estate of Louise P. V. Whitcomb is the petitioner in No. 129, involving the period from January 1 to June 14, 1921, and in Nos. 130 and 131, involving the period in 1921 after June 14, 1921, and the years 1922 to 1925, inclusive.

[2] Marguerite T. Whitcomb, also known as Marie M. E. G. Whitcomb, is the petitioner in Nos. 139, 141 and 144, involving the years 1921 to 1926, inclusive.

[3] Lydia L. Whitcomb is the petitioner in Nos. 146, 148 and 149, involving the years 1921 to 1926, inclusive.

[4] Louise A. F. E. Whitcomb is the petitioner in Nos. 145, 147 and 150, involving the years 1921 to 1926, inclusive.

[5] Charlotte A. W. Lepic is the petitioner in Nos. 140, 142 and 143, involving the years 1921 to 1926, inclusive.

[6] Napoleon Charles Louis Lepic and Charlotte de Rochechouart received no distributions of income from the estate, and their tax liability is not involved in any of the cases.

Names in italics represent persons living in 1928.

The will provided (R. 34–35) for the payment of one third of the income of the residue to Louise P. V. Whitcomb "for and during her natural life", and "the other two-thirds parts to my two children [Adolph and Charlotte] * * *, with the reversion or remainder of the whole three-thirds parts to the descendants 'per stirpes' of the said two children."

After the death of Adolph Whitcomb (which was prior to the years in question in these cases), his income interest was divided equally among his widow and his two children pending the termination of the trust on the death of Charlotte Andree Whitcomb Lepic.

After the death of Louise P. V. Whitcomb, the testator's widow, her income interest was divided equally between her estate, the testator's daughter, and the persons representing the testator's son, apparently on the theory that the testator had died intestate as to this portion of the income.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 129.—October Term, 1933.

John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 8, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

A. C. Whitcomb, a resident of California, died in 1889, and by his will, probated in that State, gave the residue of his estate in trust, one-third of the income to be paid to his widow for life, with limitations in remainder. The petitioner is the administrator of the estate of Mrs. Whitcomb, who died in 1921. The will of A. C. Whitcomb contained no direction for the computation of trust income, none for the keeping of the trustee's accounts and none for any allowance or deduction representing depreciation. Beginning about 1906 the trustee converted trust assets into real estate and other forms of investment subject to depreciation. In fiduciary income tax returns for 1921 and subsequent years, the trustee deducted from gross income an amount representing depreciation, but failed to withhold from the beneficiaries, to whom he paid income, the amount of the depreciation deduction, so that each beneficiary was paid his or her full ratable share of income for the taxable year. As Mrs. Whitcomb died in 1921 a portion of the year's income was paid to her and a portion to the petitioner as her administrator. Neither the petitioner, as administrator of Mrs. Whitcomb, nor any of the other beneficiaries, included in their returns, as income received, that proportion of the income represented by the depreciation deduction shown on the trustee's fiduciary return.

The applicable sections of the Revenue Act of 1921[1] are:

219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or any kind of property held in

[1]Revenue Act of 1921, ch. 136, Sec. 219; 42 Stat. 246.

trust, including . . . (4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(d). In cases under paragraph (4) of subdivision (a) . . . the tax shall not be paid by the fiduciary, but there shall be included in computing the income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, . . .

In the belief that these provisions warranted his action, the Commissioner of Internal Revenue increased the income shown on the petitioner's return by so much of the amount received as reflected the proportionate share of the depreciation deducted by the trustee in his fiduciary return, and determined a deficiency accordingly. The petitioner appealed to the Board of Tax Appeals.[2]

In 1928, while the case was pending before the Board, the trustee, who had annually rendered income statements to the beneficiaries, but had filed no accounts as trustee, lodged in a California court having jurisdiction of the trust, an account for the period 1903-1928 and prayed its approval. Due notice of the proceeding was given the parties in interest. Certain remaindermen objected to the account, on the ground that the trustee had paid the entire income to beneficiaries without deducting and reserving proper amounts for depreciation and for capital losses sustained. The matter coming on for hearing the court sustained the objection concerning depreciation and overruled that as to capital losses; found the amounts which should have been reserved for depreciation; refused to surcharge the trustee, but decreed that the life beneficiaries (including the estate of Louise P. V. Whitcomb) repay to the trustee the amounts which he should have withheld annually for depreciation. The sum fixed for the year 1921 was $43,003.16, which the Board of Tax Appeals has found was the

[2]The propriety of taxing the full amount of the annual distributions of income in this estate in the years 1918-1920 was tested by certain of the beneficiaries. *Whitcomb* v. *Blair*, 25 F. (2d) 528; *Appeal of Louise P. V. Whitcomb*, 4 B. T. A. 80. It was held in those cases that the beneficiaries must return what they in fact received and that depreciation, as it affected only capital assets, and not income, could not be deducted by the life beneficiaries.

correct amount, a pro rata share of which the petitioner had deducted from the reported income of Louise P. V. Whitcomb. Pursuant to this decree the petitioner repaid $10,700 to the trustee, which was more than petitioner's share of the required repayment for the year 1921. Since, however, Mrs. Whitcomb's estate owed additional amounts for each of the years 1913-1928 the balance was adjusted by a promissory note of her next of kin. Other beneficiaries also gave notes in settlement of amounts due the trustee.

The Board of Tax Appeals reversed the Commissioner.[3] The state court's judgment was held conclusive of the fact that no part of the sums paid to the beneficiaries out of the amount required to be deducted by the trustee for depreciation belonged to them; and the conclusion was, therefore, that the amount distributable to the petitioner's decedent for 1921 was the income of the trust due her, less her proportionate share of the sum representing depreciation of the trust property.

The Commissioner petitioned the Circuit Court of Appeals to review the decision, and, after hearing, the court reversed the Board and sustained the Commissioner's ruling.[4] The case is here on writ of certiorari.[5]

The petitioner insists the plain meaning of section 219 is that an income beneficiary of a trust shall pay tax, not on so much of the income as he actually receives, but on the amount he should properly have received in any tax year. His position is that if the amount of income properly "distributable" to him is in excess of the amount paid, he must return and pay tax on the larger amount, irrespective of when in the future he may actually receive the balance due him for the year in question. In this view

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[3]22 B. T. A. 118.

[4]62 F. (2d) 733.

[5]Other beneficiaries prosecuted like appeals to the Board with like result. The Circuit Court of Appeals for the Ninth Circuit reversed the Board and the taxpayers were granted certiorari in Numbers 130 and 131. The Court of Appeals of the District of Columbia reversed the Board in the cases of six beneficiaries (65 F. (2d) 803, 809). These cases are also here on certiorari as Numbers 139-144, inclusive. By a stipulation filed in this Court November 15, 1933, if the judgment of the Circuit Court of Appeals be affirmed in this case, the like judgment shall be entered in the other cases enumerated, and if the judgment in this case be reversed, the like judgment shall be entered in the others.

the respondent concurs. But conversely, says the petitioner, if in any year the beneficiary is actually paid more than is properly distributable to him, he should not return and pay tax on the excess to which he was not entitled. The respondent disagrees with this proposition. If the question be decided in favor of the respondent we need go no further; but if in favor of the petitioner, we must inquire what are the criteria for determining whether the sum actually paid was in fact distributable. On this matter also the parties are in disagreement.

1. Section 219 (a) declares that the income of estates and property held in trust is to bear the same tax as the income of individuals. The tax is measured by the gross income received by the fiduciary, less certain allowable deductions, as in the case of an individual. To clarify and emphasize this purpose it is stated that income received by a decedent's estate in course of administration, income to be accumulated for unborn or unascertained persons, income to be held for future distribution, income to be distributed periodically to beneficiaries, and income received by a guardian, to be held or distributed as the court may direct, is included in the taxable income of the estate or trust. Paragraphs (1) to (4).

Sub-section (b) puts upon the fiduciary the duty of making a return and directs what it shall contain. As respects income which is to be distributed periodically to beneficiaries the return is to include "a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed before the close of the taxable year for which the return is made."

Sub-section (c) requires the fiduciary to pay the tax on all net income of the estate or trust, save that which is distributable periodically, but sub-section (d) directs, as respects the sort of income last mentioned, "the tax shall not be paid by the fiduciary," but in computing the income of each beneficiary there shall be included "that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not," . . .

Sub-section (e) covers a case where the total income to be returned by a fiduciary is made up of two classes, as e. g. a portion to be held and accumulated and a portion to be distributed periodically to beneficiaries. The fiduciary must then prepare his re-

turn as if he were required to pay the tax on the whole and enter "as an additional deduction" (in addition, that is, to the usual deductions allowed all taxpayers by the other sections of the Act) that part of the estate or trust income "which, pursuant to the instrument or order governing the distribution, is distributable during its [the fiduciary's] taxable year to the beneficiaries." To remove all doubt of the intent of the Act, a sentence is added to the effect that in such case each beneficiary's personal income shall include the portion of the trust's income which "pursuant to the instrument or order governing the distribution, is distributable" to him.

Plainly the section contemplates the taxation of the entire net income of the trust. Plainly, also, the fiduciary, in computing net income, is authorized to make whatever appropriate deductions other taxpayers are allowed by law. The net income ascertained by this operation, and that only, is the taxable income. This the fiduciary may be required to accumulate, or, on the other hand, he may be under a duty currently to distribute it. If the latter, then the scheme of the Act is to treat the amount so distributable, not as the trust's income, but as the beneficiary's. But as the tax on the entire net income of the trust is to be paid by the fiduciary or the beneficiaries or partly by each, the beneficiary's share of the income is considered his property from the moment of its receipt by the estate. This treatment of the beneficiary's income is necessary to prevent the possibility of postponement of the tax to a year subsequent to that in which the income was received by the trustee. If it were not for this provision the trustee might pay on part of the income in one year and the beneficiary on the remainder in a later year. For the purpose of imposing the tax the Act regards ownership, the right of property in the beneficiary, as equivalent to physical possession. The test of taxability to the beneficiary is not receipt of income, but the present right to receive it. Clearly an overpayment to a beneficiary by mistake of law or fact, would render him liable for the taxable year under consideration, not on the amount paid, but on that payable. If the trustee should have deducted a sum for depreciation from the year's gross income before ascertaining the amount distributable to Mrs. Whitcomb and the other beneficiaries, but failed to do so, he paid her more than was properly distributable for the taxable year. Both

the language used and its aptness to effect the obvious scheme for the division of tax between the estate and the beneficiary seem so plain as not to require construction. The administrative interpretation has been in accord with the meaning we ascribe to the section;[6] and no decision to the contrary has been brought to our attention.

The respondent suggests that income distributable within the meaning of the section is income which was reasonably regarded by the parties as distributable at the time it was distributed. We think such a construction would do violence to the plain import of the words used.

The respondent relies on *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417. That case, however, involved the receipt of income in 1917 through a money award of a court. An appeal was taken and the award was not confirmed by the appellate court until 1922. The taxpayer's claim that the possibility of reversal shifted the receipt of the income to the later year was overruled. Section 219 had no bearing upon the question presented.

2. The will of A. C. Whitcomb contains no direction and the statutes of California make no provision as to depreciation of trust assets. In the absence of either, the Circuit Court of Appeals thought the decision of the state court inconclusive in the administration of the federal Revenue Act, and interpreted the will according to the general law of trusts, which was held to forbid deductions from distributable income on account of depreciation, and to place upon the remaindermen the burden of any shrinkage of capital value of that nature. The petitioner challenges the ruling, insisting upon the binding force of the state court's decree. Obviously that decree had not the effect of *res judicata*, and could not furnish the basis for invocation of the full faith and credit clause of the federal Constitution in the present case. The petitioner, however, says that it furnishes the standard for the application of Section 219, since the section plainly so declares; but even if this be not true, the decision settles the property rights of the beneficiaries which section 219 intended should be observed in distributing the burden of the tax.

The first position is supported by citation of the language of sub-section (d) that "there shall be included in computing the net income of each beneficiary that part of the income of the estate

[6]Treasury Regulations 62 (1922 Edition), Arts. 345 and 347.

or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not" . . . The decree of the state court is said to be the order governing distribution of this estate. The respondent reads the language as making the terms of the trust instrument controlling where there is one, and resorting to an order only where there is no instrument governing payments of income; and he adverts to the language of subsection (a) (4) exempting the fiduciary from returning "income collected by a guardian of an infant to be held or distributed as the court may direct", as explaining the use of the word "order" in subsection (d) and rendering it applicable only to income collected by a guardian. But a moment's reflection will show this is an error. The whole of a minor's income received by his guardian is taxable to the minor irrespective of its accumulation in the guardian's hands, distribution to the minor or payment for his support or education. This is the reason that a fiduciary in receipt of such income is not bound to return it as trust income. Either the minor or his guardian must make the return, but in either case it embraces all the income and is the minor's individual return, not that of the guardian or the trust.[7]

The word "order" must be given some meaning as applied to trust income which is to be distributed periodically; and we think it clear that the section intended that the order of the court having jurisdiction of the trust should be determinative as to what is distributable income for the purpose of division of the tax between the trust and the beneficiary. We understand the respondent to concede the binding force of a state statute, or a settled rule of property, followed by state courts, and, as well, an antecedent order of the court having jurisdiction of the trust, pursuant to which payments were made. But, if the order of the state court does in fact govern the distribution, it is difficult to see why, whether it antedated actual payment or was subsequent to that event, it should not be effective to fix the amount of the taxable income of the beneficiaries. We think the order of the state court was the order governing the distribution within the meaning of the Act.

[7]See Regulations 62 (1922 Edition), Arts. 347, 403, 422.

Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying section 219 of the Act of 1921.

The respondent suggests that the proceeding in the state court was a collusive one—collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax. We cannot so hold, in view of the record in the state court which is made a part of the record here. The case appears to have been initiated by the filing of a trustee's account, in the usual way. Notice was given to the interested parties. Objections to the account were presented, and the matter came on for hearing in due course, all parties being represented by counsel. The decree purports to decide issues regularly submitted and not to be in any sense a consent decree. The court ruled against the remaindermen on one point, and in their favor on another—that here involved,—but refused to surcharge the trustee, for reasons stated, and ordered repayment by the life tenants of overpayments of income consequent on the trustee's failure to withhold sums for a depreciation reserve.

But, it is said, the life beneficiaries gave their notes for the indebtedness due by them to the trust, as determined by the state court, some of which were jointly executed by those who would take in remainder, and therefore these beneficiaries are permitted to retain and enjoy the full amounts distributed to them without reference to proper deductions for depreciation, and are therefore taxable thereon as income distributed.

After the decree had been entered two of the life beneficiaries delivered their own notes to the trustee. One life beneficiary, who may become possessed of an interest in remainder, gave her note. Louise P. V. Whitcomb's daughter, a life beneficiary, executed her note, in which her two children, who are possible takers in remainder, joined. The notes were without interest, and were payable to the order of those who should be entitled in remainder at

the termination of the trust. The persons so entitled are the descendants of the two children of the testator, per stirpes. What persons if any may fill this description is of course unknown. In the event of the failure of issue the ultimate remainder is to Harvard College.

The parties evidently proceeded upon the theory that if the fund were restored to the trust it would be invested and the life beneficiaries would receive the income from it, and that a satisfactory settlement of the matter would be to have the life beneficiaries give their notes payable at the termination of the trust. At most this form of settlement amounted to a concession or gift on the part of the remaindermen to the life beneficiaries. Any advantage obtained by the latter through the adjustment was obviously not effected by the state court's decree, but by the voluntary action of the remaindermen. The decree was a judgment which fixed the rights of the remaindermen and the obligations of the life tenants. If the parties in interest chose to adjust these obligations in some manner other than by present payment of cash, their action in no wise altered the quality of the trustee's overpayments of income. We cannot seize on the form of the settlement made between the parties either to impugn the good faith and judicial character of the state court's decree, or to ignore the decree and its conclusiveness as to what was in fact and in law income distributable to the beneficiaries under the trust.

The judgment of the Court of Appeals is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 129.—October Term, 1933.

John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue, Respondent. | On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[January 8, 1934.]

Mr. Justice Cardozo, dissenting.

I assume for present purposes that the duty of the trustee under the will of Mr. Whitcomb has been adjudicated without fraud or collusion by the Superior Court of California, and that the taxing officers of the United States as well as the parties to the accounting must govern themselves accordingly.

I dissent from the conclusion that the effect of the adjudication is to diminish the taxable income of the life beneficiaries to the extent of the difference between the amount actually distributed and the amount that would have been distributed if the trustee had done his duty.

By the decree in its first form, the court adjudged that the trustee was at fault in failing to make an annual reserve for depreciation for the years 1913 to 1927 inclusive, but also adjudged that he had acted in good faith after obtaining the advice of counsel, and should therefore be relieved of any personal liability. By the same decree the recipients of the income were directed to repay to the trustee the excess payments (amounting in all to $622,440.90) "by making, executing and delivering to said Trustee their respective promissory notes payable without interest at the termination of said trust to the order of the remaindermen under said trust as they may be determined at the time of the termination of said trust."

By an amended decree made the same day (September 19, 1928) the direction to make payment by the delivery of promissory notes

was omitted, and the decree thereupon stood as one commanding payment simply, without statement of the time or manner.

The recipients of the income reverted at once to the method of payment prescribed by the original decree and did so with the approval of the trustee and the presumptive owners of the remainders. Charlotte A. Lepic, a daughter of the testator, and a life beneficiary made her promissory note for $395,867.06, payable without interest at the termination of the trust, and her two children, Napoleon and Charlotte, whose interest was solely as remaindermen, were co-makers with her. Louise Whitcomb, a daughter of a deceased son of the testator, made a note for $118,353.85, signing by her guardian. Her interest was partly that of a beneficiary, and partly as the presumptive owner of an estate in remainder. Lydia, whose interest was the same as that of Louise, made her note for a like amount. Marie, the widow of the deceased son, made her note for $69,159.35. Her interest was in income only. All the notes were payable to the order of "the remaindermen under the said trust as they may be determined to be" when the trust is at an end. All were without interest. The sum total of the notes is substantially equal to the total overpayments, except for $10,700, paid in cash by the administrator of the widow of the testator who died during the pendency of these proceedings. There is nothing to show that the cash was applied upon account of the overpayment due for the years covered by the assessment. In the absence of such evidence, the law appropriates the payment to the items first in point of time. The conclusion therefore follows that as to any overpayments made by the trustee during the years of the contested liability for taxes, the limit of any obligation now resting on the beneficiaries of the trust is the payment of these promissory notes to the persons entitled in remainder when the trust shall terminate.

I assume in aid of the petitioner that an enforcible duty of repayment existing at the time of an assessment of a tax will call for the reduction of the taxable income to the same extent as if repayment has been actually made, though much can be said in support of another view. The existence of a duty is, however, an indispensable condition. If money distributed to a beneficiary is to be freed from taxation on the ground that though received and enjoyed, it will have to be returned, the recipient must make it

plain that burden and benefit are exact equivalents. He must show that the effect of the fulfilment of the obligation to repay will be to cancel all the gain, and leave him in the same position as if the income had never been received.

At the time of the review of these assessments by the Board of Tax Appeals, the California court had announced by its decree that the trustee had distributed to the beneficiaries more income than was due; but the presumptive owners of the remainders had exonerated the recipients from any duty of repayment until the end of the trust and then without interest upon moneys overpaid. In effect the act of the fiduciary had been adopted and confirmed to a proportionate extent.* Whether there was ratification or confirmation in a strict and narrow sense is not decisive of the controversy. The law of taxation is more concerned with the substance of economic opportunity than with classifying legal concepts, and tagging them with names and labels. *Burnet* v. *Harmel*, 287 U. S. 103. If the testator had stated in so many words that there should be no deduction for depreciation in distributing the income, but that at the termination of the trust the beneficiaries would owe to the remaindermen without interest a sum equivalent to the deduction that would otherwise have been made, the result in its practical aspect would have been identical with the one achieved under this will through confirmation or consent. Here the parties by agreement have made their own rule, which relates back to the year when the income was received.

To put the case in another way: the remaindermen might have signed an order before the income was paid over directing the trustee to make no deduction for depreciation of the trust. They did not do so then, but by relation backwards they did it afterwards. Without the aid of the agreement the decree of the California court would have imposed upon the trustee a duty to use diligent endeavor to collect without delay the moneys misapplied. Through the acceptance of these notes the presumptive owners of the remainders absolved him from that duty and thus confirmed his action. Consent or confirmation may supplement a will or deed of trust with the result that income "distributed" will have become "distributable" also. It may work a like result where the meaning of the instrument has been established by an "order" of

*Cf. American Law Institute, Restatement of the Law of Trusts, § 210.

a court. The order is no more than evidence of preexisting rights and duties. If the obligation to make restitution had been extinguished for all time, and the agreement extinguishing it had been proved to the assessing officers before the assessment became final, a court would listen with little patience to the taxpayer's complaint that a tax was not due because there had been an interval during which the money would have been reclaimable if the law had run its course. The situation is not different in principle where the benefits confirmed to the recipients of the income are something less than they would be if the duty to return had been extinguished altogether.

For the benefits, though not complete, are not illusory or trivial. The Commissioner's assessment is supported by a presumption of correctness. If a taxpayer would overthrow it, he has the burden of proving it erroneous, and of fixing in dollars and cents the amount of the error. By the decision just announced, the taxpayer is relieved of that burden. He has received upon account of his taxable income an allowance of the face amount of an indebtedness payable in the future without deduction for the benefits resulting from the time and manner of the payment. How substantial those benefits are will be obvious if we let them pass before us in review.

The beneficiaries, instead of restoring the overpaid income to the corpus of the estate, are permitted to retain it until the termination of the trust and to dispose of it as their own. They gain thereby the benefit of investing or consuming, with the opportunity for profit or enjoyment that goes along with such a privilege. If gain is derived, it is theirs without accountability to any one. If a loss ensues and the money is used up, a court of bankruptcy is open to them, in the event of their insolvency, to discharge the liability. At the making of the notes, their resources may have been adequate to enable them to restore what had been unlawfully obtained. At the time when the notes become due, they may find themselves without a dollar except their interest in the trust estate.

But this does not exhaust the catalogue of benefits. In any reckoning of these, account must be taken of the relation of kinship between makers and payees. Except in remote contingencies the notes will be payable either to the children or descendants of the makers, or to the makers themselves. If the makers are dead at the termination of the trust, they will have had it in their power to

write a clause into their wills requiring their descendants who elect to take under the wills to cancel any claim that has accrued upon the notes. If the makers are then alive, they will have put their names to notes that will be payable to themselves. There is grave doubt, to say the least, whether any one of them will ever have to pay a dollar.

Up to this, attention has been confined to terms of the notes that have to do with the restitution of the principal. The postponement of payment of the principal was, however, accompanied by a provision that there should be no liability for interest. On its face this was a gain. The argument is made, however, that the gain is unreal for the reason that the overpayments, if restored, would be accretions to the corpus of the trust, and that the income on the accretions would be due to the same persons absolved from liability for interest. But this is only a part truth. The makers gained the difference between interest at the legal rate upon the principal of the notes and the lower rate of income likely to be earned by a trustee who invests the funds of a trust in conformity with law. What is even more important, they gained the privilege in the meantime of retaining for themselves what would otherwise be principal in the hands of the trustee and of using it as they pleased.

These are important benefits. They would be unhesitatingly recognized as such by any investor or by any man of business. Some account should be taken of them before we say that the income of the trust was not income in the hands of the beneficiaries who received it as their own and who for all that appears may never come under a duty to pay it back to any one.

I think the Court of Appeals did not err in upholding the assessment and that its decree should be affirmed.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this dissent.